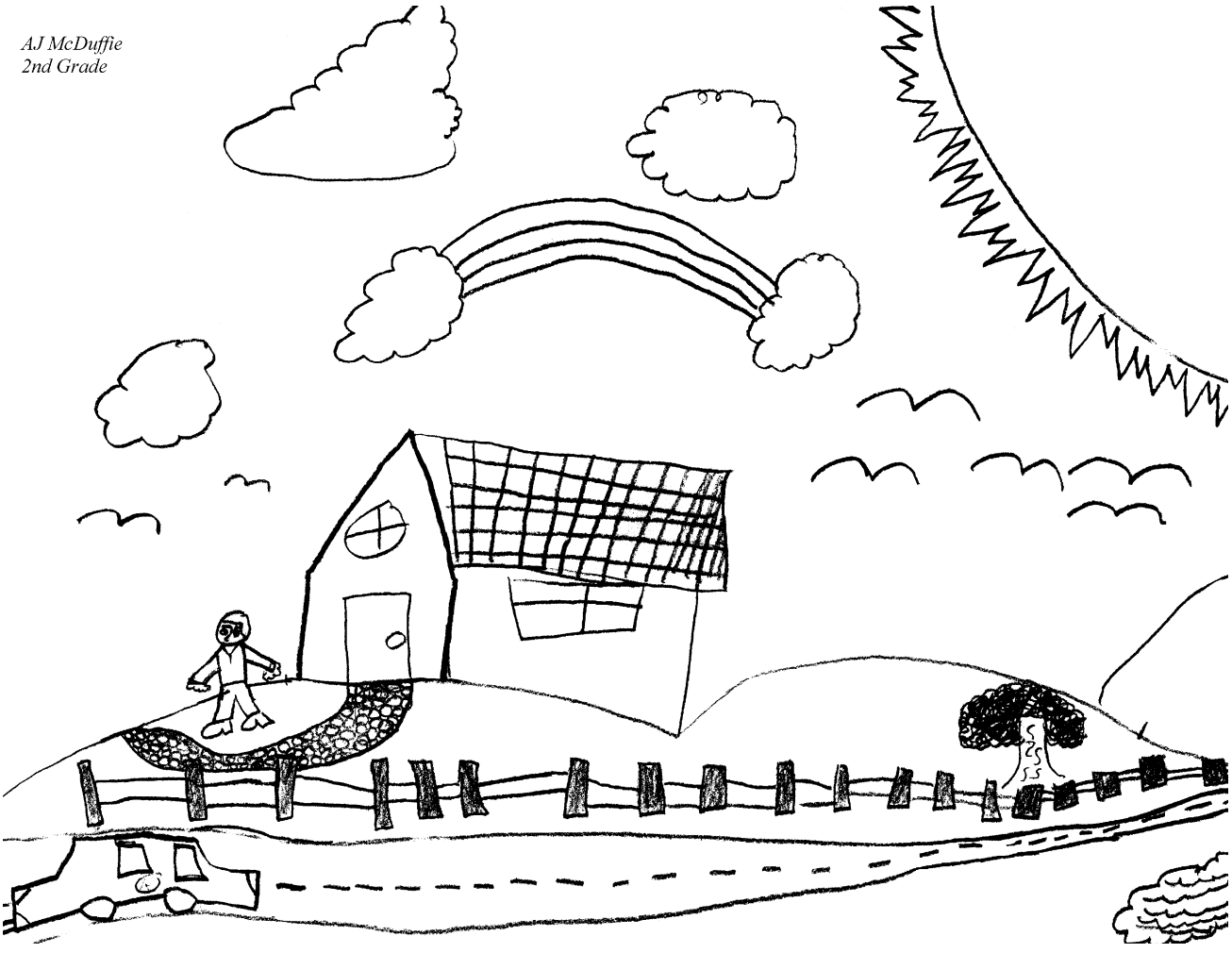
TEXAS REGISTER

Volume 32 Number 36 *September 7, 2007* *Pages 5833 - 6216*

AJ McDuffie
2nd Grade



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

Texas Register, **(ISSN 0362-4781, USPS 120-090),** is published weekly (52 times per year) for $211.00 ($311.00 for first class mail delivery) by LexisNexis Matthew Bender & Co., Inc., 1275 Broadway, Albany, N.Y. 12204-2694.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Albany, N.Y. and at additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** 136 Carlin Rd., Conklin, N.Y. 13748-1531.

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
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IN THIS ISSUE

TABLES AND GRAPHICS

IN ADDITION

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for August 15, 2007

Appointed as Inspector General for Health and Human Services for a term to expire February 1, 2008, Bart Bevers of Round Rock. Mr. Bevers is replacing Brian Glenn Flood of Austin whose term expired.

Appointments for August 17, 2007

Appointed to the Texas Parks and Wildlife Commission for a term to expire February 1, 2009, Margaret Martin of Boerne (replacing Ned Holmes of Houston who resigned).

Appointed to the Texas Parks and Wildlife Commission for a term to expire February 1, 2013, Antonio Falcon, M.D. of Rio Grande City (replacing Joseph B. Fitzsimons of San Antonio whose term expired).

Appointed to the Texas Parks and Wildlife Commission for a term to expire February 1, 2013, Karen Hixon of San Antonio (replacing Donato D. Ramos of Laredo whose term expired).

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2013, Thomas Whaylen of Wichita Falls (new position).

Appointed to the Texas State Board of Social Worker Examiners for a term to expire February 1, 2009, Jody Anne Armstrong of Abilene (replacing Carrie Yeats of Lubbock who resigned).

Appointed to the Texas State Board of Social Worker Examiners for a term to expire February 1, 2011, Denise Pratt of Baytown (replacing Willie McGee of Plainview whose term expired).

Appointed to the Texas State Board of Social Worker Examiners for a term to expire February 1, 2013, Mark Talbot of McAllen (replacing Holly Anawaty of Houston who is deceased).

Appointed to the Texas Real Estate Commission for a term to expire January 31, 2013, Adrian Arriaga of McAllen (replacing Louise Hull of Victoria whose term expired).

Appointed to the Texas Real Estate Commission for a term to expire January 31, 2013, Chris Day of Jacksonville (replacing Paul Jordan of Georgetown whose term expired).

Appointment for August 20, 2007

Appointed to the Veterans' Land Board for a term to expire December 29, 2010, Alan K. Sandersen of Missouri City (replacing Cephus S. "Dusty" Rhodes of El Paso whose term expired).

TRD-200703946

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Proclamation 41-3133

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby certify that Hurricane Dean poses a threat of imminent disaster along the Texas Coast beginning August 17, 2007.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby proclaim the existence of such threat and direct that all necessary measures both public and private as authorized under Section 418.015 of the code be implemented to meet that threat.

As provided in Section 418.016, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the incident.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 17th day of August, 2007.

Rick Perry, Governor

Attested by: Phil Wilson, Secretary of State

TRD-200703945

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinion

RQ-0614-GA

Requestor:

The Honorable Warren Chisum

Chair, Committee on Appropriations

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Proper construction of section 556.0055, Government Code, which regulates certain expenditures by a political subdivision or private entity that receives state funds (RQ-0614-GA)

Briefs requested by September 24, 2007

For further information, please access the Web site at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200703954
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: August 28, 2007

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Opinions

Opinion No. GA-0565

The Honorable Patrick M. Rose

Chair, Committee on Human Services

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Proper calculation of the fee that a campaign manager may charge to a charitable organization for services rendered in connection with the state employee charitable campaign (RQ-0574-GA)

S U M M A R Y

The proper calculation of the fee described by section 659.148(c), Government Code, must be based upon the aggregate amount of contributions collected on a statewide basis.

Opinion No. GA-0566

The Honorable Tracy King

Chair, Committee on Border and International Affairs

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Authority of the El Paso County District or County Clerk to establish an online electronic database accessible to the public (RQ-0498-GA)

S U M M A R Y

Pursuant to Local Government Code section 191.008, the El Paso County Commissioners Court may adopt an order authorizing the District Clerk and County Clerk to create electronic databases of public information in court case documents and to provide online access to that information. Records maintained by each clerk must be available to the public without charge in the clerk's office, but persons who contract with the county for electronic access to such information may be charged a fee as set by the Commissioners Court. A court clerk should redact social security numbers and bank account numbers from documents made available online.

For further information, please access the Web site at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200703955
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: August 28, 2007

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TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39.

Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinions

EAO-476. The Texas Ethics Commission has been asked to consider whether section 255.003 of the Election Code prohibits the spending of city funds for a city council member's newsletter. (AOR-539)

SUMMARY

The newsletter at issue (copy attached to opinion found at www.ethics.state.tx.us/opinions/476.html) is "political advertising" as defined in section 251.001 (16) of the Election Code, and therefore public funds may not be used to pay for the newsletter.

EAO-477. The Texas Ethics Commission has been asked whether a former employee of a regulatory state agency who worked on the standard specification manual used for agency contracts is prohibited by Government Code section 572.054(b) from working on a private company's bid for contracts that utilize those specifications. (AOR-540)

SUMMARY

A former employee of a regulatory agency would not violate Government Code section 572.054(b) by working on a private company's bid for an agency contract that utilizes the standard specifications as described in this request that the requestor participated in writing as an agency employee.

The Texas Ethics Commission is authorized by section 571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; and (9) Chapter 39, Penal Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-200703895
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: August 24, 2007

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.20

The Texas Department of Housing and Community Affairs proposes amendments to §1.20, concerning Asset Resolution and Contract Enforcement. The proposed amendments make changes to the existing rule by deleting compliance penalty provisions from the rule. As amended §1.20 defines a process for the disposition of department assets for which early delinquency intervention and work out approaches have not been successful and provides a process for enforcing Department contracts. The amendments eliminate references to compliance penalties which are addressed as administrative penalties in Chapter 60, Subchapter C of this title.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the amended section as proposed.

Mr. Gerber has also determined that for each year of the first five-years the amended section is in effect the public benefit anticipated as a result of enforcing the amended section will be the more efficient organization and use of Department resources as a result of providing separate processes for the disposition of Department assets and the assessment and collection of administrative penalties. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the amended section as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on the amendments to this section. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The amended section is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

The amended section affects no other code, article or statute.

§1.20. Asset Resolution and Contract Enforcement.

(a) Purpose. The purposes of this section are[:]

(1) To provide guidance to interested parties on potential actions available to the Department when a party that has obligated itself to carry out a contract or construct or operate an asset is not performing or operating according to the agreed upon terms and

(2) To establish appropriate procedures to implement the general policy of requiring compliance with all contractual undertakings made in connection with awards [~~the receipt of funds or other support~~] provided by the Department pursuant to the various state and federal programs that it administers.

(b) Definitions.

(1) Administrator--The Person responsible for performing under a Contract with the Department.

(2) Affiliated Party--A Person in a relationship with the Administrator on a Contract with the Department. Does not apply to an Affiliated Party for Application purposes.

(3) Asset--A property covered by a LURA, Contract, grant agreement, or Commitment or any other property acquired, improved, or subsidized, directly or indirectly, in whole or in part with funds provided by any program(s) administered by the Department.

(4) Audit--An audit required to be performed by a third party or performed by the Department relating to a Contract.

(5) Board--The Governing Board of the Department.

(6) Commitment--A legally binding agreement between the Department and another party providing for funds, tax credits, or other financial support.

[~~(7) Compliance Monitoring Fees--The fees identified in a LURA or other Contract payable by Project Owner related to an Asset.~~]

[~~(8) Compliance Rules--The rules found in 10 Texas Administrative Code Chapter 60.~~]

(7) [~~(9)~~] Contract--Any executed written agreement between the Department and an Administrator, Home Owner, Mortgagor, Project Owner, Subrecipient, Subrecipient Organization, or other beneficiary of a Department program.

(8) [~~(10)~~] Deed-in-lieu of Foreclosure--A deed to a lender given by an owner/borrower conveying mortgaged property to prevent a lender from bringing Foreclosure proceedings or to eliminate the need for Foreclosure.

(9) [~~(11)~~] Deed of Trust--An instrument used to create a lien or mortgage by which the Mortgagor transfers his or her title to a trustee who holds it as security for the benefit of a lender.

(10) [~~(12)~~] Default--As defined in a LURA or Contract.

(11) [~~(13)~~] Delinquent Loan--Any mortgage loan in which the scheduled payment has not been received by the due date.

(12) [~~(14)~~] Department--The Texas Department of Housing and Community Affairs.

(13) [~~(15)~~] Development--Any Project that has a construction component, either in the form of new construction or the rehabilitation of residential housing.

(14) [~~(16)~~] Eligible Household--A household that meets the requirements associated with a Department Contract or LURA and applicable law, as in effect from time to time.

(15) [~~(17)~~] Event of Default--As defined in a LURA or Contract.

(16) [~~(18)~~] Executive Director--As defined under Texas Government Code §2306.036 and/or §2306.038.

(17) [~~(19)~~] Finding--A report or other communication from the Department indicating a need for corrective action by an Administrator, Project Owner, Recipient, Subrecipient or other beneficiary of a Department program.

(18) [~~(20)~~] Forbearance--The act of agreeing, either conditionally or unconditionally, in reliance upon express representations, to refrain from enforcing one or more legal obligations, such as making scheduled payments on a debt or complying with one or more non-monetary provisions of a Contract. A relief provision that provides for a period of reduced or suspended payments to enable the Mortgagor to cure a delinquency is an example of a forbearance.

(19) [~~(21)~~] Foreclosure--A legal proceeding, in or out of court, to gain title or to force a sale of a mortgaged property in order to satisfy unpaid amounts due under the debt secured by such mortgaged property on the property.

(20) [~~(22)~~] Loan Modification--A written agreement to a change in one or more terms of the Contract or contractual documents relating to an existing loan between the Department and Mortgagor.

(21) [~~(23)~~] LURA--A Land Use Restriction Agreement that has been executed by the Department and a Person related to a specific property or properties and filed with required recording authorities.

(22) [~~(24)~~] Mortgagor--The party (a "borrower") who borrows the money and uses his or her real property as collateral and security for the payment of the debt.

(23) [~~(25)~~] Person--Any individual, partnership, corporation, association, trust, unit of government, community action agency, or public or private organization of any character, however organized.

(24) [~~(26)~~] Real Estate Owned--Property acquired by the Department as the lender, usually through foreclosure or acceptance of a deed-in-lieu.

(25) [~~(27)~~] Receivership--Legal action as defined in Contract or LURA.

(26) [~~(28)~~] Responsible Party--The Administrator, Home Owner, Mortgagor, Project Owner, Subrecipient, Subrecipient Organization, or other beneficiary of a Department program subject to this rule for purposes of asset resolution or contract enforcement.

(27) [~~(29)~~] Review Committee--The committee, chaired by the Executive Director and comprised of the Deputy Executive Director for Programs, the Deputy Executive Director for Administration, [~~the Director of PMC,~~] the Director of Real Estate Analysis and two additional rotating members appointed by the Chair. The Review Committee will determine asset resolutions and contract enforcement [~~or enforcement~~] recommendations.

(28) [~~(30)~~] Workout Program--A written agreement as an alternative to foreclosure that the Department may offer to the Mortgagor of a defaulted mortgage.

(c) Potential Actions Related to Home Ownership.

(1) Early Delinquency Intervention. According to the terms of a Contract between the Department and a Mortgagor the Department will provide a loan billing statement to the Mortgagor or Home Owner as payments are due. A Contract will be identified as delinquent unless the mortgage payment is made on the 16th day after the due date. A late fee will be assessed on all identified delinquent loans. A computer generated "Friendly Reminder" notice of default is mailed to the Mortgagor on any loan for which payment has not been received by the 16th day of the month payment was due. A "Late Payment" notice of default is mailed to the Mortgagor on any loan that is past due more than forty-five (45) days. An "Urgent" notice of default is mailed to the Mortgagor on all loans that are more than sixty (60) days past due. The status of all mortgage loans serviced in-house by the Loan Servicing section will be reported monthly to the Credit Bureau through the Department's credit reporting processes, including delinquencies.

(2) Workout Program. The Department supports delinquent Mortgagors' efforts to meet their mortgage obligations so they can avoid Foreclosure and remain in their homes when feasible. That means, among other things, using available tools that are appropriate under the circumstances to avoid Foreclosure; being judicious in approaching loss mitigation efforts and promoting open and effective communication with Mortgagors, including giving reasonable opportunity to resolve legitimate disputes. The Department after consultation with the Review Committee may, but is not required to, perform one or more of the following alternatives to cure the delinquency:

(A) Phone Contact. Delinquent Mortgagors identified as more than forty-five (45) days past due may be contacted by phone to determine why the Mortgagor has not made the required payment(s). The Mortgagor is encouraged to contact the Department prior to this call to notify the Department of circumstances for the delinquencies.

(B) Face-to-Face Interviews. Face-to-face interviews may be conducted when phone contact is not possible with the Mortgagor, and/or the Mortgagor is unresponsive to various attempts by the Department to establish communication and discuss the delinquency. Face-to-face interviews are done to determine the condition of the Department's collateral and discuss workout options available to the Mortgagor. If the Mortgagor is unavailable at the time a face-to-face interview is attempted, the Department will leave a "Collection Flyer" notice of default, marked "confidential," addressed to the Mortgagor at the property location.

(C) Written Repayment Agreement. Once a Mortgagor's ability to pay has been assessed, if the period necessary to cure the delinquency will exceed forty-five (45) days from the time contact is made, the Department will require the Mortgagor to enter into a formal written repayment agreement specifying the terms of repayment for the delinquent amount. Only in exceptional cases will a repayment period exceed twelve (12) months. If the Mortgagor abides by the terms of the written repayment agreement, the Department may suspend accrual of late fees for the duration of the agreement.

(D) Forbearance. The Review Committee may recommend a Forbearance agreement if the Mortgagor is temporarily unable

to make any amount of payment due because of documented evidence of illness, death of a co-mortgagor, or loss of employment. Forbearance agreements will not exceed three (3) months. Any suspended payments will be made up as an additional single payment upon maturity. All accrued unpaid principal and interest amounts will be added to the end of the loan as a balloon payment. This will not result in a change of terms, and no recording fees or T-38 Endorsement will be necessary.

(E) Loan Modification. The Review Committee may recommend a loan modification to alter the terms of the note including, but are not limited to, the interest rate, principal balance, payment amount, and the maturity date. This is a formal change in the original terms of the note. Any principal, escrow shortages, and fees such as recording fees, title policy fees, and pre-foreclosure fees will be included in the new terms.

(F) Pre-foreclosure Sale. If the Mortgagor is unable to cure its delinquency, and the Mortgagor's desire is to avoid Foreclosure by the Department, the Department may consent to the sale of the property by the Mortgagor to a third (3rd) party buyer within a reasonable time as determined by the Department. If the proceeds from the Pre-foreclosure Sale are insufficient to extinguish the Mortgage Lien, the remaining outstanding balance under the Note secured by the Mortgage Lien will be converted to an Unsecured Note executed by the original Mortgagor payable to the Department unless other provisions are stated in the Note and/or Deed of Trust.

(G) Deed-in-lieu of Foreclosure. On a seriously delinquent mortgage where other options have been unsuccessful and/or the Mortgagor intends to abandon the property, the Department may consent to a Deed-in-lieu of Foreclosure. As a condition of the Department accepting a Deed-in-lieu of Foreclosure, the property must be free and clear of all encumbrances and liens other than liens of the Department.

(3) Final Resolution. In the event that a workout as described in paragraph (2) of this subsection is unsuccessful, the Department upon recommendation of the Review Committee may take one or [~~of~~] more of the following actions:

(A) Creditor Claim in Bankruptcy. When a Mortgagor files for bankruptcy, the Department will take all actions that are necessary to protect its interests. All collection efforts outside the bankruptcy courts by the Department will cease during the bankruptcy period. The Department will file a proof of claim when appropriate. In a bankruptcy case that has been dismissed, all normal collection efforts will resume. In a bankruptcy case that has been Discharged in Bankruptcy, the Mortgagor will either reaffirm the debt in accordance with the bankruptcy or the Department may proceed to foreclose on the mortgage lien.

(B) Foreclosure. After all workout options have been exhausted, the Review Committee will review the loan for possible recommendation to foreclose on the property used as collateral to secure the Mortgage Lien. If the Department is in an inferior lien position, and the value of the property warrants it, the Department may elect to purchase a superior lien loan in order to proceed with Foreclosure and protect its interest.

(C) Debt Forgiveness. In exceptional circumstances, the Review Committee may recommend the forgiveness based on hardship conditions. The Committee shall consider the following conditions as hardships: documented long term disability resulting in a permanent inability to pay, and a permanent inability to pay where it would not be in the best interest of the Department to foreclose based on economic conditions of the property and/or continued expenses which are incurred due to escrow responsibilities. The ability to forgive will also be contingent upon the method of funding. All hardship cases will be considered on a case by case basis. In cases where program guidelines allow for forgiveness based on death of borrower(s), the Department will take the appropriate steps to forgive these loans.

(D) Charge-offs. When the Department determines that all collection efforts have been exhausted on delinquent loans and there is no economic value in foreclosure the loan may be charged off. A charge-off will be reported to the credit bureau through the Department's normal credit reporting processes and to any appropriate agencies including the IRS. When a debt has been charged off, the Mortgagor will be placed on the Department's Debarment list and will not be eligible to apply for future programs.

(d) Potential Actions Related to Multi-family Properties.

[~~(1)~~] *Financial Delinquency Issues.* Owner/managers who fail to perform under the terms of the loan documents leading to an event of default will be provided timely notice of the default. For purposes of this rule a financial delinquency occurs when the responsible party fails to pay loan payments or fees due in a timely manner, fails to maintain adequate insurance and/or fails to pay taxes on a timely basis. When an event of default occurs, the Department will:

(1) [~~(A)~~] Notice. The Department will provide notice according to terms of the Loan Documents and or LURA to the obligor that a potential event of default has occurred. For events of default that are curable, the notice will provide a reasonable time period for correction, not to exceed sixty (60) days from the date notice or such longer period as may be required by the Contract.

(2) [~~(B)~~] Workout. In the event the Responsible Party contacts the Department within the corrective period and provides sufficient evidence of the cause for a failure to pay, the Department may enter into a workout plan that may include: Forbearance of the payment of loans or fees; Loan modification; a payment of taxes or a placement of insurance at additional cost to the Responsible Party. Workouts must address those factors that the Department, in its sole discretion, deems appropriate to address the cause of the problems that required the workout, such as a requirement of a change of management for a property where multiple events of default occur or a repeated pattern of defaults occur. Only in exceptional cases, approved by the Board on the recommendation of the Review Committee, will a Forbearance period exceed twelve (12) months. Not more than one year of taxes or one year of insurance premium shall be added to the principal amount of the note during the workout period without further corrective action being taken. If a loan modification is recommended by staff, the extension of the note or reduction of the interest to be paid will be consistent with then existing policies of the Department. The Review Committee will approve any modifications to Contract or LURAs.

(3) [~~(C)~~] Final Resolution. In the event the Responsible Party and the Department cannot agree upon terms of a workout within six (6) months, the Department will consider all legal action available to it at the end of the six months. All legal action includes litigation up to and including placing the property in Receivership or Foreclosure on the property.

(4) [~~(D)~~] Waiver and Actions Consistent with Other Law. Any failure to act by the Department does not constitute a waiver of this rule. Where applicable, the Department will seek to protect the interests of the Department on behalf of the State of Texas. Nothing in this rule is intended to conflict with the laws of the United States and the State of Texas and where any conflicts arise, the rule will defer to the existing laws.

[~~(2) Monitoring During Compliance Period (Tax Credit Properties). During the compliance period, any tax credit property found to be in violation of 10 Texas Administrative Code Chapter 60 will be covered by this Rule in addition to the Internal Revenue Service~~

~~Code, Code of Federal Regulations and related revenue rulings and any other official guidance provided by the Internal Revenue Service.]~~

~~[(3) Monitored Properties (Tax Credit Properties After Original Compliance Period, HTF or HOME Properties Subject to a LURA). Properties failing to comply with the rules of the Department and/or the terms of the related LURAs are subject to the following actions:]~~

~~[(A) Because of the additional staff time and additional record keeping requirements associated with non-compliance with the agreed upon terms the following table is established as a compliance penalty structure as indicated:]~~
~~[Figure: 10 TAC §1.20(d)(3)(A)]~~

~~[(B) Compliance Penalty Enforcement. In determining the compliance penalty, the Department will use a list of published factors to assess the amount of the penalty. Compliance penalties will continue to be assessed until such time as the corrective action has been taken. In the event that corrective action is not taken, the Department will take the following actions:]~~

~~*[(i)* Provide notice to the last known address of the party against whom the penalty has been assessed;]~~

~~*[(ii)* A description of the violations and the governing authority for application of the compliance penalty;]~~

~~*[(iii)* The procedures for appealing the compliance penalty assessed including the provisions under 10 Texas Administrative Code §§ 1.7, 1.8 and 1.17.]~~

~~*[(iv)* If the party either does not respond or fails to take corrective action, the Department will refer the matter to the Attorney General for determination of the legal remedies available and action to be taken.]~~

(e) Potential Actions Related to Contract Administration on Awarded Funds.

(1) Contracts Involving Department Awards other than Housing Tax Credit Bonds. The Department is responsible for numerous awards of funds or resources intended to benefit Texans who qualify for programs administered by the Department. Frequently these programs are administered by Subrecipients--some of whom directly perform the work and others who hire others to assist them in service delivery. These rules either repeat or supplement the language included in individual contracts. When a contractor fails to perform adequately, the Department may take any of the following actions:
Figure: 10 TAC §1.20(e)(1) (No change.)

(2) Special Conditions for Contract Involving Construction Awards. In addition to the contract actions found in paragraph (1) of this subsection, the following are potential actions specifically related to construction related awards:
Figure: 10 TAC §1.20(e)(2) (No change.)

(f) Administration of Section.

(1) Program and Compliance staff will be the first line reviewers for performance with Department policies and procedures related to Contracts and/or LURA's. After providing initial notice to the Responsible Party and time for response, the involved staff will refer non-resolved matters to identified asset resolution and contract enforcement staff. The asset resolution and contract enforcement staff will review and develop a recommended action plan and timeline to the Review Committee, including final resolution if other efforts are not successful. The Review Committee will approve, approve with modifications or reject the submitted plan. The Executive Director will evaluate to determine if Board action is required.

(2) The asset resolution and contract enforcement staff will implement the approved plan including any required referrals to the Office of the Attorney General or other parties.

(3) Unless otherwise indicated, Responsible Parties will have access to Department procedures for appealing actions taken under this rule including the provisions under 10 Texas Administrative Code §§1.7, 1.8 and 1.17.

(4) If the Department has determined that a provision of this rule must be expedited to protect the assets of the State of Texas, any non-statutory timeline may be reduced by the Department.

(5) Any section of this rule may be waived for just cause by the Executive Director or the Governing Board except for notice provisions and federal and state statutory provisions.

(g) Debarment for Failure to Perform.

(1) Any Administrator, Affiliated Party, Person or Responsible Party receiving funds (including Housing Tax Credits) directly or indirectly may be subject to debarment under this section.

(2) Procedures for Placement in Debarment.

(A) Recommendation for inclusion on the debarment list is done by referral from Department Division Directors. An Administrator, Affiliated Party, Person or Responsible Party may also submit a referral to a Department Division Director for consideration.

(B) Once referred the Administrator, Affiliated Party, Person or Responsible Party will be placed in Suspension status. While in Suspension the entity can continue to be reviewed for participation in the application or allocation cycle, but a review by the Review Committee must be completed prior to the award of Department funds (or allocation of Housing Tax Credits). A determination of inclusion on the debarment list will preclude the entity from participation for the term determined by the Review Committee, beginning with any current application or allocation award request. The following actions will be taken by the referring Department Division Director:

(i) Notice will be provided to the Administrator, Affiliated Party, Person or Responsible Party of the referral to the Department's Review Committee for inclusion on the debarment list.

(ii) The Administrator, Affiliated Party, Person or Responsible Party will be given an opportunity to provide information for consideration by the Review Committee. This information must be submitted within 14 working days from the date of notice.

(C) The Department Division Director will present the Review Committee with the following for consideration of the referral:

(i) Documentation to support the action that the Administrator, Affiliated Party, Person or Responsible Party has taken to warrant referral for placement on the debarment list.

(ii) A copy of the notice provided to Administrator, Affiliated Party, Person or Responsible Party.

(iii) A copy of any information provided in response by the Administrator, Affiliated Party, Person or Responsible Party to the notice.

(D) The Review Committee may determine based on the information provided that the entity does not warrant being placed on the debarment list. The Review Committee may recommend placement on the debarment list and will recommend a term for debarment based on the following structure:
Figure: 10 TAC §1.20(g)(2)(D) (No change.)

(E) Agreement or [of] Appeal. A Person has 10 days from the date of the notice of the Review Committee recommendation to appeal or invoke the Alternative Dispute Resolution Rule, §1.17.

(F) The Board of Directors will provide final approval for placement on the Debarment list. The board will review the Review Committees' determination and recommended term of debarment. The Administrator, Affiliated Party, Person or Responsible Party will be given opportunity to appeal during the Board Meeting.

(G) Once approved by the Department's Board of Directors the entity will be placed on the Debarment List for the determined term.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703870
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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10 TAC §1.22

The Texas Department of Housing and Community Affairs (the Department) proposes new §1.22, concerning Providing Current Contact Information to the Department. The purpose of the new section is to provide a single point of contact within the Department where all persons doing business with the Department can provided updated contact information.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section as proposed.

Mr. Gerber has also determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be more efficient communications with those who conduct regular business with the Department which will enhance the State's ability to provide decent, safe and affordable housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new section as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on this new section. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The new section is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new section.

§1.22. Providing Contact Information to the Department.

(a) Any person doing business with the Department shall notify the Department, of any change in contact information, including names, addresses, telephone numbers, electronic mail addresses and fax numbers. In addition, the notification shall include all Departments contract number's and project number's of any type. The notification shall be made as follows:

(1) by mail: Texas Department of Housing and Community Affairs, Contact Information Update, P.O. Box 13941, Austin, Texas 78711-3941;

(2) by electronic mail: contactinformationupdate@tdhca.state.tx.us; or

(3) at the Department's website (www.tdhca.state.tx.us).

(b) All persons doing business with the Department are responsible for keeping their contact information current pursuant to subsection (a) of this section and as required by other Department rules. The Department is entitled to rely solely on the most recent contact information on file with the Department at the time any notice or other communication is sent. An affected person may appeal the Department's decision to rely on the contact information on file by using the procedure available in §1.7 of this title.

(c) The notification requirements of this section are in addition to any other change of contact information notification requirements of the Department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703868
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, ENVIRONMENTAL SITE ASSESSMENT, PROPERTY CONDITION ASSESSMENT, AND RESERVE FOR REPLACEMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs (the Department) proposes to amend §§1.31 - 1.37, concerning the Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment and Reserve for Replacement Rules and Guidelines. These sections are proposed for amendment in order to address guidelines for underwriting, market analysis, appraisal, environmental site assessment, and property condition assessment performed for requests submitted to the Department for review and the establishment of reserve for replacement and subsequent monitoring for developments funded through the Department.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the amendments are in effect there will

be no fiscal implications for state or local governments as a result of enforcing or administering the amendments as proposed.

Mr. Gerber has also determined that for each year of the first five-years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be to enhance the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on these amendments. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The amendments are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed amendments.

§1.31. General Provisions.

(a) Purpose. The Rules in this subchapter apply to the underwriting, market analysis, appraisal, environmental site assessment, property condition assessment, and reserve for replacement standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA"). This chapter provides rules for the underwriting review of an affordable housing development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of the Department's portfolio. In addition, this chapter guides the underwriting staff in making recommendations to the Executive Award and Review Advisory Committee "the Committee"), Executive Director, and TDHCA Governing Board ("the Board") to help ensure procedural consistency in the determination of Development feasibility (§2306.0661(f) and §2306.6710(d), Texas Government Code). Due to the unique characteristics of each development the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

(b) Definitions. Terms [~~Many of the terms~~] used in this subchapter that are also defined in Chapter 50 of this title (the Department's Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP") have the same meaning as in the QAP [~~,proposed~~]. Those terms that are not defined in the QAP or which may have another meaning when used in Subchapter [~~subchapter~~] B of this chapter [~~title~~], shall have the meanings set forth in this subchapter [~~subsection unless the context clearly indicates otherwise~~].

(1) Affordable Housing--Housing that has been funded through one or more of the Department's programs or other local, state or federal programs or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement or other form of Deed Restriction.

(2) Bank Trustee--A bank authorized to do business in this state, with the power to act as trustee.

(3) Cash Flow--The funds available from operations after all expenses and debt service required to be paid has been considered.

(4) Credit Underwriting Analysis Report--Sometimes referred to as the "Report." A decision making tool used by the Department and Board containing a synopsis and reconciliation of the application information submitted by the Applicant.

(5) Comparable Unit--A Unit, when compared to the subject Unit, similar in overall condition, unit amenities, utility structure, and common amenities, and

(A) for purposes of calculating the inclusive capture rate targets the same population and is likely to draw from the same demand pool;

(B) for purposes of estimating the Restricted Market Rent targets the same population and is similar in net rentable square footage and number of bedrooms; or

(C) for purposes of estimating the subject Unit market rent does not have any income or rent restrictions and is similar in net rentable square footage and number of bedrooms.

(6) Contract Rent--Maximum rent limits [~~Rent Limits~~] based upon current and executed rental assistance contract(s), typically with a federal, state or local governmental agency.

(7) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times loan principal and interest are covered by Net Operating Income.

(8) Development--Sometimes referred to as the "Subject Development." Multi-unit residential housing that meets the affordability requirements for and requests or has received funds from one or more of the Department's sources of funds.

(9) EGI--Effective Gross Income. The sum total of all sources of anticipated or actual income for a rental Development less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(10) ESA--Environmental Site Assessment. An environmental report that conforms with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with the Department's Environmental Site Assessment Rules and Guidelines in §1.35 of this subchapter as it relates to a specific Development.

(11) First Lien Lender--A lender whose lien has first priority.

(12) Gross Program Rent--Sometimes called the "Program Rents." Maximum rent limits [~~Rent Limits~~] based upon the tables promulgated by the Department's division responsible for compliance by program and by county or Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA").

(13) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand and rental rates or pricing conducted in accordance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter as it relates to a specific Development.

(14) Market Analyst--Any person who prepares a market study.

(15) [~~(14)~~] Market Rent--The unrestricted rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units.

(16) [~~(15)~~] NOI--Net Operating Income. The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(17) [~~(16)~~] Primary Market--Sometimes referred to as "Primary Market Area" or "Submarket" or "PMA". The area defined by the Qualified Market Analyst as described in §1.33(d)(8) of this title from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(18) [~~(17)~~] PCA--Property Condition Assessment. Sometimes referred to as "Physical Needs Assessment," "Project Capital Needs Assessments," "Property Condition Report," or "Property Work Write-Up." An evaluation of the physical condition of the existing property and evaluation of the cost of rehabilitation conducted in accordance with the Department's Property Condition Assessment Rules and Guidelines in §1.36 of this subchapter [~~title~~] as it relates to a specific Development.

(19) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(20) [~~(18)~~] Rent Over-Burdened Households--Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 40% of gross income towards total housing expenses.

(21) [~~(19)~~] Reserve Account--An individual account:

(A) Created to fund any necessary repairs for a multifamily rental housing development; and

(B) Maintained by a First Lien Lender or Bank Trustee.

(22) [~~(20)~~] Restricted Market Rent--The restricted rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units with the same rent and income restrictions.

(23) [~~(21)~~] Secondary Market--Sometimes referred to as "Secondary Market Area". The area defined by the Qualified Market Analyst as described in §1.33(d)(7) of this title.

(24) [~~(22)~~]Supportive Housing--Sometimes referred to as "Transitional Housing." Rental housing intended solely for occupancy by individuals or households transitioning from homelessness or abusive situations to permanent housing and typically consisting primarily of efficiency units.

(25) [~~(23)~~] Sustaining Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses and mandatory debt service requirements for a Development.

(26) [~~(24)~~] TDHCA Operating Expense Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Subchapter A of Chapter 60 of this title, [~~process~~] and published on the Department's web site.

(27) [~~(25)~~] Underwriter--The author(s), as evidenced by signature, of the Credit Underwriting Analysis Report.

(28) [~~(26)~~] Unstabilized Development--A Development with Comparable Units that has been approved for funding by the TDHCA Board or is currently under construction or has not maintained a 90% occupancy level for at least 12 consecutive months following construction completion.

(29) [~~(27)~~] Utility Allowance--The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services," provided by the local entity responsible for administering the HUD Section 8 program with most direct jurisdiction over the majority of the buildings existing, [~~or~~] a documented estimate from the utility provider proposed in the Application, or for an existing development an allowance calculated by the Department pursuant to §60.109 of this title. Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the subject development [~~Subject Development~~] and consistent with the building plans provided.

(30) [~~(28)~~] Work Out Development--A financially distressed Development seeking a change in the terms of Department funding or program restrictions based upon market changes.

(c) Appeals. Certain programs contain express appeal options. Where not indicated, [~~10 Tex. Admin. Code~~] §1.7 and §1.8 of this chapter include general appeal procedures. In addition, the Department encourages the use of Alternative Dispute Resolution methods as outlined in [~~10 TAC~~] §1.17 of this chapter.

§1.32. Underwriting Rules and Guidelines.

(a) General Provisions. The Department Governing Board has authorized the development of these rules under its authority under §2306.148, Texas Government Code. The rules provide a mechanism to produce consistent information in the form of an Underwriting Report to provide interested parties information the Board relies upon in balancing the desire to assist as many Texans as possible by providing no more financing than necessary and have independent verification that Developments are economically feasible. The Report should consider all information timely provided by the Applicant. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development by the Department.

(b) Report Contents. The Report provides an organized and consistent synopsis and reconciliation of the application information submitted by the Applicant. The Report should consider only information that is provided in accordance with the time frames provided in the current QAP, Program Rules or Notice of Funds Availability as appropriate. The Report should also identify the number of revisions and date of most current revision to any information deemed to be relevant by the Underwriter.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or allocation of Tax Credits based on the lesser amount calculated by the program limit method (if applicable), gap/DCR method, or the amount requested by the Applicant as further described in paragraphs (1) - (3) of this subsection, and states any feasibility conditions to be placed on the award.

(1) Program Limit Method. For Developments requesting Housing Tax Credits, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is as defined in the QAP. For Developments requesting funding through a Department program other than Housing Tax Credits, this method is based upon calculation of the funding limit based on current program rules at the time of underwriting.

(2) Gap/DCR Method. This method evaluates the amount of funds needed to fill the gap created by total development cost less total non-Department-sourced funds or Tax Credits. In making this determination, the Underwriter resizes any anticipated deferred developer fee down to zero before reducing the amount of Department funds or Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Tax Credits. In making this determination, the Department adjusts the permanent loan amount and/or any Department-sourced loans, as necessary, such that it conforms to the DCR standards described in this section.

(3) The Amount Requested. The amount of funds that is requested by the Applicant as reflected in the Application [~~application~~] documentation.

(d) Operating Feasibility. The operating financial feasibility of Developments funded by the Department is tested by adding total income sources and subtracting vacancy and collection losses and operating expenses to determine Net Operating Income. This Net Operating Income is divided by the annual debt service to determine the Debt Coverage Ratio. The Underwriter characterizes a Development as infeasible from an operational standpoint when the Debt Coverage Ratio does not meet the minimum standard set forth in paragraph (4)(D) of this subsection. The Underwriter may choose to make adjustments to the financing structure, such as lowering the debt and increasing the deferred developer fee that could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Income. In determining the Year 1 proforma, the[~~The~~] Underwriter evaluates the reasonableness of the Applicant's income estimate by determining the appropriate rental rate per unit based on contract, program and market factors. Miscellaneous income and vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are applied unless well-documented support is provided.

(A) Rental Income. The Underwriter will calculate the appropriate rent on a conservative or Contract Rent basis for comparison to the Applicant's estimate in the Application. The conservative basis for a restricted unit is the lesser of the Gross Program Rent less Utility Allowances ("Net Program Rent [~~program rent~~]") or [~~Market Rent or~~] Restricted Market Rent. The conservative basis for an unrestricted unit is the lesser of the Market Rent or Applicant's projected rent. [~~or Contract Rent is utilized by the Underwriter in calculating the rental income for comparison to the Applicant's estimate in the application.~~] Where [~~multiple programs are funding the same units,~~] Contract Rents are included, they will be used regardless of the conservative basis derived rent. [~~used, if applicable. If Contract Rents do not apply, the lowest Program Rents less Utility Allowance ("net Program Rent") or Market Rents or Restricted Market Rent, as determined by the Market Analysis that are lower than the net Program Rents, are utilized.~~]

(i) Market Rents. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Market Rent by unit, as long as the proposed Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable rent. Random checks of the validity of the Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter [~~title~~].

(ii) Restricted Market Rent. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size and income and rent restrictions provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Restricted Market Rent by unit, as long as the proposed Restricted Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable restricted rent. Random checks of the validity of the Restricted Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix [~~Attribute Adjustment Matrix~~] should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this subchapter [~~title~~].

(iii) Gross Program Rents less Utility Allowance or Net Program Rents. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the Application [~~application~~]. The Underwriter uses the Gross Program Rents as promulgated by the Department's division responsible for compliance for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all of the Application [~~applications~~] are underwritten with the rents promulgated for the same year. Gross Program Rents are reduced by the Utility Allowance. The Utility Allowance figures used are determined based upon what is identified in the Application [~~application~~] by the Applicant as being a utility cost paid by the tenant and upon other consistent documentation provided in the Application [~~application~~].

(I) Units must be individually metered for all utility costs to be paid by the tenant.

(II) Gas utilities are verified on the building plans and elsewhere in the Application [~~application~~] when applicable.

(III) Trash allowances paid by the tenant are rare and only considered when the building plans allow for individual exterior receptacles.

(IV) Refrigerator and range allowances are not considered part of the tenant-paid utilities unless the tenant is expected to provide their own appliances, and no eligible appliance costs are included in the development cost breakdown.

(iv) Contract Rents. The Underwriter reviews submitted rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The underwriting analysis will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used in the underwriting analysis with the recommendations of the Report conditioned upon receipt of final approval of such increase.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to late fees, storage fees, laundry income, interest on deposits, carport rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $15 per unit per month range. Exceptions may be made at the discretion of the Underwriter for garage income, pass-through utility payments, pass-through water, sewer and trash payments, cable fees, congregate care/assisted living/elderly facilities, and child care facilities.

(i) Exceptions must be justified by operating history of existing comparable properties.

(ii) The Applicant must show that the tenant will not be required to pay the additional fee or charge as a condition of renting an apartment unit and must show that the tenant has a reasonable alternative.

(iii) The Applicant's operating expense schedule should reflect an offsetting cost associated with income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iv) Collection rates of exceptional fee items will generally be heavily discounted.

(v) If the total secondary income is over the maximum per unit per month limit, any cost associated with the construction, acquisition, or development of the hard assets needed to produce an additional fee may also need to be reduced from Eligible Basis for Tax Credit Developments as they may, in that case, be considered to be a commercial cost rather than an incidental to the housing cost of the Development.

(C) Vacancy and Collection Loss. The Underwriter uses a vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss) unless the Market Analysis reflects a higher or lower established vacancy rate for the area. Elderly and 100% project-based rental subsidy Developments and other well documented cases may be underwritten at a combined 5% at the discretion of the Underwriter if the historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(D) Effective Gross Income. The Underwriter independently calculates EGI. If the EGI figure provided by the Applicant is within 5% of the EGI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's proforma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate by line item comparisons based upon the specifics of each transaction, including the type of Development, the size of the units, and the Applicant's expectations as reflected in their proforma. Historical stabilized certified or audited financial statements of the Development or Third Party quotes specific to the Development will reflect the strongest data points to predict future performance. The Department's database of property in the same location or region as the proposed Development also provides heavily relied upon data points; the Department's database summary is available on the TDHCA website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Finally, well documented information provided in the Market Analysis, the Application [~~application~~], and other sources may be considered.

(A) General and Administrative Expense. General and Administrative Expense includes all accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. The underwriting tolerance level for this line item is 20%.

(B) Management Fee. Management Fee is paid to the property management company to oversee the effective operation of the property and is most often based upon a percentage of Effective Gross Income as documented in the management agreement contract. Typically, 5% of the Effective Gross Income is used, though higher percentages for rural transactions that are consistent with the TDHCA Database can be concluded. Percentages as low as 3% may be utilized if documented by a fully executed management contract agreement with an acceptable management company. The Underwriter will require documentation for any percentage difference from the 5% of the Effective Gross Income standard.

(C) Payroll and Payroll Expense. Payroll and Payroll Expense includes all direct staff payroll, insurance benefits, and payroll taxes including payroll expenses for repairs and maintenance typical of a conventional development. It does not, however, include direct security payroll or additional supportive services payroll. The underwriting tolerance level for this line item is 10%.

(D) Repairs and Maintenance Expense. Repairs and Maintenance Expense includes all repairs and maintenance contracts and supplies. It should not include extraordinary capitalized expenses that would result from major renovations. Direct payroll for repairs and maintenance activities are included in payroll expense. The underwriting tolerance level for this line item is 20%.

(E) Utilities Expense (Gas & Electric). Utilities Expense includes all gas and electric energy expenses paid by the owner. It includes any pass-through energy expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(F) Water, Sewer and Trash Expense. Water, Sewer and Trash Expense includes all water, sewer and trash expenses paid by the owner. It would also include any pass-through water, sewer and trash expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(G) Insurance Expense. Insurance Expense includes any insurance for the buildings, contents, and liability but not health or workman's compensation insurance. The underwriting tolerance level for this line item is 30%.

(H) Property Tax. Property Tax includes all real and personal property taxes but not payroll taxes. The underwriting tolerance level for this line item is 10%.

(i) The per unit assessed value will be calculated based on the capitalization rate published on the county taxing authority's website. If the county taxing authority does not publish a capitalization rate on the internet, a capitalization rate of 10% will be used or comparable assessed values may be used in evaluating this line item expense.

(ii) Property tax exemptions or proposed payment in lieu of tax agreement (PILOT) must be documented as being reasonably achievable if they are to be considered by the Underwriter. At the discretion of the Underwriter, a property tax exemption that meets known federal, state and local laws may be applied based on the tax-exempt status of the Development Owner and its Affiliates.

(I) Reserves. Reserves include annual reserve for replacements of future capitalizable expenses as well as any ongoing additional operating reserve requirements. The Underwriter includes minimum reserves of $250 per unit for new construction and $300 per unit for all other Developments. The Underwriter may require an amount above $300 for Developments other than new construction based on information provided in the PCA. Higher levels of reserves also may be used if they are documented in the financing commitment letters.

(J) Other Expenses. The Underwriter will include other reasonable and documented expenses, not including depreciation, in-

terest expense, lender or syndicator's asset management fees, or other ongoing partnership fees. Lender or syndicator's asset management fees or other ongoing partnership fees also are not considered in the Department's calculation of debt coverage. The most common other expenses are described in more detail in clauses (i) - (iv) of this subparagraph.

(i) Supportive Services Expense. Supportive Services Expense includes the documented cost to the owner of any non-traditional tenant benefit such as payroll for instruction or activities personnel. The Underwriter will not evaluate any selection points for this item. The Underwriter's verification will be limited to assuring any anticipated costs are included. For all transactions supportive services expenses are considered in calculating the Debt Coverage Ratio.

(ii) Security Expense. Security Expense includes contract or direct payroll expense for policing the premises of the Development. The Applicant's amount is typically accepted as provided. The Underwriter will require documentation of the need for security expenses that exceed 50% of the anticipated payroll expense estimate discussed in subparagraph (C) of this paragraph.

(iii) Compliance Fees. Compliance fees include only compliance fees charged by TDHCA. The Department's charge for a specific program may vary over time; however, the Underwriter uses the current charge per unit per year at the time of underwriting. For all transactions compliance fees are considered in calculating the Debt Coverage Ratio.

(iv) Cable Television Expense. Cable Television Expense includes fees charged directly to the owner of the Development to provide cable services to all units. The expense will be considered only if a contract for such services with terms is provided and income derived from cable television fees is included in the projected EGI. Cost of providing cable television in only the community building should be included in General and Administrative Expense as described in subparagraph (A) of this paragraph.

(K) The Department will communicate with and allow for clarification by the Applicant when the overall expense estimate is over 5% greater or less than the Underwriter's estimate. In such a case, the Underwriter will inform the Applicant of the line items that exceed the tolerance levels indicated in this paragraph, but may request additional documentation supporting some, none or all expense line items. If an acceptable rationale for the difference is not provided, the discrepancy is documented in the Report and the justification provided by the Applicant and the countervailing evidence supporting the Underwriter's determination is noted. If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's Year 1 proforma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income. NOI is the difference between the EGI and total operating expenses. If the Year 1 NOI figure provided by the Applicant is within 5% of the Year 1 NOI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating the Year 1 DCR the Underwriter will maintain and use his independent calculation of NOI unless the Applicant's Year 1 EGI, Year 1 total expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(4) Debt Coverage Ratio. Debt Coverage Ratio is calculated by dividing Net Operating Income by the sum of loan principal and interest for all permanent sources of funds. Loan principal and interest, or "Debt Service," is calculated based on the terms indicated in the submitted commitments for financing. Terms generally include the amount of initial principal, the interest rate, amortization period, and repayment period. Unusual financing structures and their effect on Debt Service will also be taken into consideration.

(A) Interest Rate. The interest rate used should be the rate documented in the commitment letter.

(i) Commitments indicating a variable rate must provide a detailed breakdown of the component rates comprising the all-in rate. The commitment must also state the lender's underwriting interest rate, or the Applicant must submit a separate statement executed by the lender with an estimate of the interest rate as of the date of the statement.

(ii) The maximum rate allowed for a competitive application cycle is evaluated by the Director of the Department's division responsible for Credit Underwriting Analysis Reports and posted to the Department's web site prior to the close of the Application Acceptance Period [~~application acceptance period~~]. Historically this maximum acceptable rate has been at or below the average rate for 30-year U.S. Treasury Bonds plus 400 basis points.

(B) Amortization Period. The Department generally requires an amortization of not less than 30 years and not more than 50 years or an adjustment to the amortization structure is evaluated and recommended. In non-Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period.

(C) Repayment Period. For purposes of projecting the DCR over a 30-year period for Developments with permanent financing structures with balloon payments in less than 30 years, the Underwriter will carry forward Debt Service calculated based on a full amortization and the interest rate stated in the commitment.

(D) Acceptable Debt Coverage Ratio Range. The acceptable Year 1 DCR range for all priority or foreclosable lien financing plus the Department's proposed financing falls between a minimum of 1.15 to a maximum of 1.35. HOPE VI and USDA Rural Development transactions may underwrite to a DCR less than 1.15 based upon documentation of acceptance from the lender.

(i) For Developments other than HOPE VI and USDA Rural Development transactions, if the DCR is less than the minimum, the recommendations of the Report are conditioned upon a reduced debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reduction of the interest rate or an increase in the amortization period for TDHCA funded loans;

(II) A reclassification of TDHCA funded loans to reflect grants, if permitted by program rules;

(III) A reduction in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the maximum, the recommendations of the Report are conditioned upon an increase in the debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reclassification of TDHCA funded grants to reflect loans, if permitted by program rules;

(II) An increase in the interest rate or a decrease in the amortization period for TDHCA funded loans;

(III) An increase in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Tax Credit allocation may be made based on the gap/DCR method described in subsection (c)(2) of this section.

(iv) Although adjustments in Debt Service may become a condition of the Report, future changes in income, expenses, and financing terms could allow for an acceptable DCR.

(5) Long Term Proforma. The Underwriter will create a 30-year operating proforma[~~.~~]

(A) The base year projection utilized is the Underwriter's Year 1 EGI, Year 1 operating expenses, and Year 1 NOI unless the Applicant's Year 1 EGI, Year 1 total operating expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(B) A 3% annual growth factor is utilized for income and a 4% annual growth factor is utilized for expenses.

(C) Adjustments may be made to the Long Term Proforma if sufficient support documentation is provided by the Applicant. Support may include

(i) documentation with terms for project [~~Project~~]-based rental assistance [~~Rental Assistance~~] or operating subsidy [~~Operating Subsidy~~];

(ii) a fully executed management contract with clear terms;

(iii) documentation prepared and signed by the Central Appraisal District (CAD) with jurisdiction over the Development indicating the appraisal methodology consistently employed by the CAD and a ten-year history, beginning with the Application year, of tax rates for each taxing district with jurisdiction over the Development; and

(iv) required reserve for replacement schedule prepared and signed by the proposed permanent lender or equity provider. In no instance will the reserve for replacement figure included in the Long Term Proforma be less than the minimum requirements as described in §1.37 of this subchapter[~~title~~].

(e) Development Costs. The Development's need for permanent funds and, when applicable, the Development's Eligible Basis is based upon the projected total development costs. The Department's estimate of the total development cost will be based on the Applicant's project cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For new construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's total development cost is within 5% of the Underwriter's estimate. In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level due to the reliance upon the PCA. If the Applicant's total development cost is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's total cost estimate.

(1) Acquisition Costs. The proposed acquisition price is verified with the fully executed site control document(s) for the entire proposed site.

(A) Excess Land Acquisition. Where more land is being acquired than will be utilized for the site and the remaining acreage is not being utilized as permanent green space, the value ascribed to the proposed Development will be prorated from the total cost reflected in the site control document(s). An appraisal or tax assessment value may be tools that are used in making this determination; however, the Underwriter will not utilize a prorated value greater than the total amount in the site control document(s).

(B) Identity of Interest Acquisitions.

(i) The acquisition will be considered an identity of interest transaction when an Affiliate of, a Related Party to, or any owner at any level of the Development Team

(I) is the current owner in whole or in part of the proposed property, or

(II) was the owner in whole or in part of the proposed property during any period within the 36 months prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide subclauses (I) and (II) of this clause:[~~the additional documentation identified in §50.9(h)(7)(A) of this title to support the transfer price to be used in the underwriting analysis.~~]

[(iii) ~~In no instance will the acquisition cost utilitized by the Underwriter exceed the lesser of:~~]

(I) the original acquisition cost listed in the submitted settlement statement or, if a settlement statement is not available, the original asset value listed in the most current audited financial statement for the identity of interest owner, and[~~or~~]

(II) if the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the application, [~~the "as-is" value conclusion in the submitted appraisal.~~]

(-a-) an appraisal that meets the requirements of §1.34 of this chapter, and

(-b-) any other verifiable costs of owning, holding, or improving the Property, excluding seller financing, that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include Property taxes, interest expense, a calculated return on equity at a rate consistent with the historical returns of similar risks, the cost of any physical improvements made to the Property, the cost of rezoning, replatting or developing the Property, or any costs to provide or improve access to the Property.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, a calculated return on equity at a rate consistent with the historical returns of similar risks, and allow the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure.

(iii) in no instance will the acquisition cost utilized by the Underwriter exceed the lesser of the original acquisition cost evidenced by clause (ii)(I) of this subparagraph plus costs identified in clause (ii)(II)(-b-) of this subparagraph, or the "as-is" value conclusion evidenced by clause (ii)(II)(-a-) of this subparagraph.

(C) Acquisition of Buildings for Tax Credit Properties. In order to make a determination of the appropriate building acquisition value, the Applicant will provide and the Underwriter will utilize an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this subchapter [title]. [The value of the improvements are the result of the difference between the as-is appraised value less the land value.] The Underwriter will [may alternatively] prorate the actual or identity of interest sales price based upon a [lower]calculated "as-is" improvement value over the total "as-is" value provided in the appraisal, so long as the resulting land value utilized by the Underwriter is not less than the land value indicated in the appraisal or tax assessment. In the case where the land value indicated by either the appraisal or tax assessment is greater than the prorata land value attributed to the sales price as described above, the greater of the land value in the appraisal or tax assessment is deducted from the sales price to determine the acquisition basis.

(2) Off-Site Costs. Off-Site costs are costs of development up to the site itself such as the cost of roads, water, sewer and other utilities to provide the site with access. All off-site costs must be well documented and certified by a Third Party engineer on the required application form.

(3) Site Work Costs. Project site work costs exceeding $9,000 per Unit must be well documented and certified by a Third Party engineer on the required application form. In addition, for Applicants seeking Tax Credits, documentation in keeping with §49.9(h)(6)(G) of this title will be utilized in calculating eligible basis.

(4) Direct Construction Costs. Direct construction costs are the costs of materials and labor required for the building or rehabilitation of a Development.

(A) New Construction. The Underwriter will use the Marshall and Swift Residential Cost Handbook and historical final cost certifications of all previous Housing Tax Credit [housing tax credit] allocations to estimate the direct construction cost for a new construction Development. If the Applicant's estimate is more than 5% greater or less than the Underwriter's estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report.

(i) The "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook, based upon the details provided in the application and particularly site and building plans and elevations will be used to estimate direct construction costs. If the Development contains amenities not included in the Average Quality standard, the Department will take into account the costs of the amenities as designed in the Development.

(ii) If the difference in the Applicant's direct cost estimate and the direct construction cost estimate detailed in clause (i) of this subparagraph is more than 5%, the Underwriter shall also evaluate the direct construction cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous housing tax credit allocations for:

(I) the county in which the Development is to be located, or

(II) if cost certifications are unavailable under subclause (I) of this clause, the uniform state service region in which the Development is to be located.

(B) Rehabilitation including Reconstruction Costs. In the case where the Applicant has provided a PCA which is inconsistent with the Applicant's figures as proposed in the development cost schedule, the Underwriter may request a supplement executed by the PCA provider supporting the Applicant's estimate and detailing the difference in costs. If said supplement is not provided or the Underwriter determines that the reasons for the initial difference in costs are not well-documented, the Underwriter utilizes the initial PCA estimations in lieu of the Applicant's estimates.

(5) Contingency. All contingencies identified in the Applicant project cost schedule will be added to Contingency with the total limited to the guidelines detailed in this paragraph. Contingency is limited to a maximum of 5% of direct costs plus site work for new construction Developments and 10% of direct costs plus site work for rehabilitation Developments. For Housing Tax Credit [tax credit] Developments, the percentage is applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contingency cost. The Applicant's figure is used by the Underwriter if the figure is less than 5%.

(6) Contractor Fee. Contractor fees are limited at a total of 14%. The percentage is applied to the sum of the direct construction costs plus site work costs. For tax credit Developments, the percentages are applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contractor fees. For Developments also receiving financing from TX-USDA-RHS, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TX-USDA-RHS requirements.

(7) Developer Fee. Developer fee claimed must be proportionate to the work for which it is earned and consistent with §49.9(d)(6) of this title.

(A) For Tax Credit Developments, the development cost associated with developer fees and Development Consultant (also known as Housing Consultant) fees included in Eligible Basis cannot exceed 15% of the project's Total Eligible Basis less developer fees for developments proposing 50 units or more and 20% of the project's Total Eligible Basis less developer fees for developments proposing 49 units or less, as defined in the QAP.

(B) In the case of a transaction requesting acquisition Tax Credits

(i) the allocation of eligible developer fee in calculating rehabilitation/new construction Tax Credits will not exceed 15% of the rehabilitation/new construction basis less developer fees for developments proposing 50 units or more and 20% of the rehabilitation/new construction basis less developer fees for developments proposing 49 units or less, and

(ii) no developer fee attributable to an identity of interest acquisition of the Development will be included in Eligible Basis.

(C) For non-Tax Credit Developments, the percentage can be up to 15% but is based upon total development costs less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any other identity of interest acquisition cost.

(8) Financing Costs. Eligible construction period financing is limited to not more than one year's fully drawn construction loan funds at the construction loan interest rate indicated in the commitment. Any excess over this amount is removed to ineligible cost and will not be considered in the determination of developer fee.

(9) Reserves. The Department will utilize the terms proposed by the syndicator or lender as described in the commitment letter(s) or the amount described in the Applicant's project cost schedule

if it is within the range of two to six months of stabilized operating expenses less management fees plus debt service.

(10) Other Soft Costs. For Tax Credit Developments all other soft costs are divided into eligible and ineligible costs. Eligible costs are defined by Internal Revenue Code but generally are costs that can be capitalized in the basis of the Development for tax purposes. Ineligible costs are those that tend to fund future operating activities. The Underwriter will evaluate and accept the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Internal Revenue Code. If the Underwriter questions the eligibility of any soft costs, the Applicant is given an opportunity to clarify and address the concern prior to removal from Eligible Basis.

(f) Developer Capacity. The Underwriter will evaluate the capacity of the Person(s) accountable for the role of the Developer to determine their ability to secure financing and successfully complete the Development. The Department will review financial statements, and personal credit reports for those individuals anticipated to guarantee the completion of the Development.

(1) Credit Reports. The Underwriter will characterize the Development as "high risk" if the Applicant, General Partner, Developer, anticipated Guarantor or Principals thereof have a credit score which reflects a 40% or higher potential default rate.

(2) Financial Statements of Principals. The Applicant, Developer, any principals of the Applicant, General Partner, and Developer and any Person who will be required to guarantee the Development will be required to provide a signed and dated financial statement and authorization to release credit information in accordance with the Department's program rules.

(A) Individuals. The Underwriter will evaluate and discuss financial statements for individuals in a confidential portion of the Report. The Development may be characterized as "high risk" if the Developer, anticipated Guarantor or Principals thereof is determined to have limited net worth or significant lack of liquidity.

(B) Partnerships and Corporations. The Underwriter will evaluate and discuss financial statements for partnerships and corporations in the Report. The Development may be characterized as "high risk" if the Developer, anticipated Guarantor or Principals thereof is determined to have limited net worth or significant lack of liquidity.

(C) If the Development is characterized as a high risk for either lack of previous experience as determined by the TDHCA division responsible for compliance or a higher potential default rate is identified as described in paragraph (1) or (2) of this subsection, the Report must condition any potential award upon the identification and inclusion of additional Development partners who can meet the Department's guidelines.

(g) Other Underwriting Considerations. The Underwriter will evaluate numerous additional elements as described in subsection (b) of this section and those that require further elaboration are identified in this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) The Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) The Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain; or

(C) The Development must be designed to comply with the QAP, as proposed.

(2) The Underwriter will identify in the report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject.

(3) Supportive Housing. The unique development and operating characteristics of Supportive Housing Developments may require special consideration in the following areas:

(A) Operating Income. The extremely-low-income tenant population typically targeted by a Supportive Housing Development may include deep-skewing of rents to well below the 50% AMI level or other maximum rent limits established by the Department. The Underwriter should utilize the Applicant's proposed rents in the Report as long as such rents are at or below the maximum rent limit proposed for the units and equal to any project based rental subsidy rent to be utilized for the Development.

(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident support services, or other items than typical Affordable Housing Developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments provided by the Applicant or otherwise available to the Underwriter.

(C) DCR and Long Term Feasibility. Supportive Housing Developments may be exempted from the DCR requirements of subsection (d)(4)(D) of this section if the Development is anticipated to operate without conventional debt. Applicants must provide evidence of sufficient financial resources to offset any projected 15-year cumulative negative cash flows. Such evidence will be evaluated by the Underwriter on a case-by-case basis to satisfy the Department's long term feasibility requirements and may take the form of one or a combination of the following: executed subsidy commitment(s), set-aside of Applicant's financial resources, to be substantiated by an audited financial statement evidencing sufficient resources, and/or proof of annual fundraising success sufficient to fill anticipated operating losses. If either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Supportive Housing Development, a resolution from the Applicant's governing board must be provided confirming their irrevocable commitment to the provision of these funds and activities.

(D) Development Costs. For Supportive Housing that is styled as efficiencies, the Underwriter may use "Average Quality" dormitory costs from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the application, as a base cost in evaluating the reasonableness of the Applicant's direct construction cost estimate for new construction Developments.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. An infeasible Development will not be recommended for funding or allocation unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendations of the report upon receipt of documentation supporting the alternative feasible financing structure. A development will be characterized as infeasible if paragraph (1), ~~[or]~~ (2)

or (3) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (4) - (6) [~~(3) - (5)~~] of this subsection applies unless paragraph (7) [~~(6)~~] of this subsection also applies.

(1) Inclusive Capture Rate. The method for determining the inclusive capture rate for a Development is defined [~~Defined~~] in §1.33(d)(10)(E) of this subchapter [~~title~~]. The Underwriter will independently verify all components and conclusions of the inclusive capture rate and may at their discretion use independently aquired demographic data to calculate demand. The Development

(A) is characterized as Rural[~~, Elderly~~] or Special Needs and the inclusive capture rate is above 75% for the total proposed units; or

(B) is characterized as Elderly in an urban area and the inclusive capture rate is above 50% for the total proposed units; or

(C) [~~(B)~~] is not characterized as Rural, Elderly or Special Needs and the inclusive capture rate is above 25% for the total proposed units.

(D) [~~(C)~~] Developments meeting the requirements of subparagraph (A), [~~or~~] (B) or (C) of this subparagraph [~~paragraph~~] may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph [~~paragraph~~] apply.

(i) Replacement Housing. The Development is comprised of Affordable Housing which replaces previously existing substandard Affordable Housing within the Primary Market Area as defined in §1.33 of this subchapter [~~title~~] on a Unit for Unit basis, and gives the displaced tenants of the previously existing substandard Affordable Housing a leasing preference.

(ii) Existing Housing. The Development is comprised of existing Affordable Housing which is at least 80% occupied and gives displaced existing tenants a leasing preference as stated in the submitted relocation plan.

(2) Concentration Rate. The Underwriter will independently verify the number of rental units in multi-unit buildings based on the most recent Census data and the completion of Department funded or other known rental Developments in the area.

(A) The Development is in a Census Tract(s), as established by the U.S. Census Bureau, where the total number of rental units in buildings with three or more units exceeds the ratio of 1,432 units per square mile.

(B) The Primary Market Area is contained in Census Tract(s), as established by the U.S. Census Bureau, where the total number of rental units in buildings with three or more units exceeds the ratio of 1,000 units per square mile.

(C) Development's in areas which exceed the limits in subparagraph (A) or (B) of this paragraph may avoid being characterized as infeasible if paragraph (1)(D)(i) or (ii) of this subsection applies.

(3) [~~(2)~~] Deferred Developer Fee. Development requesting an allocation of tax credits cannot repay the estimated deferred developer fee, based on the Underwriter's recommended financing structure, from cashflow within the first 15 years of the long term proforma as described in subsection (d)(5) of this section.

(4) [~~(3)~~] Restricted Market Rent. The Restricted Market Rent for units with rents restricted at 60% of AMGI is less than both the Net [~~net~~] Program Rent and Market Rent for units with rents restricted at or below 50% of AMGI unless the development proposes all restricted units with rents restricted at or below the 50% of AMGI level. [~~The requirement in this section may be waived by the Executive Director of the Department on appeal if documentation is submitted by the Applicant to support unique circumstances of the market that would provide mitigation.~~]

(5) [~~(4)~~] Initial Feasibility. The Year 1 annual total operating expense divided by the Year 1 Effective Gross Income is greater than 65%.

(6) [~~(5)~~] Long Term Feasibility. Any year in the first 15 years of the Long Term Proforma, as defined in subsection (d)(5) of this section, reflects

(A) negative Cash Flow; or

(B) a Debt Coverage Ratio below 1.15.

(7) [~~(6)~~] Exceptions. The infeasibility conclusions may be excepted where either of the following apply. [~~Developments meeting the requirements of one or more of paragraphs (3) - (5) of this subsection may be re-characterized as feasible if one or more of subparagraphs (A) - (C) of this paragraph and subparagraph (D) of this paragraph apply.~~]

(A) The requirements in this subsection may be waived by the Executive Director of the Department on appeal if documentation is submitted by the Applicant to support unique circumstances that would provide mitigation.

(B) Developments meeting the requirements of one or more of paragraphs (4) - (6) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (vi) of this subparagraph apply.

(i) [~~(A)~~] The Development will receive Project-based Section 8 Rental Assistance and a firm commitment with terms including contract rent and number of units is submitted at application.

(ii) [~~(B)~~] The Development will receive rental assistance in association with USDA-RD-RHS financing.

(iii) [~~(C)~~] The Development will be characterized as public housing as defined by HUD.

(iv) The Development will be characterized as 100% Supportive Housing and evidence of adequate financial support for the long term viability of the Development is provided.

(v) The Development has other long term project based restrictions on rents that allow rents to increase based upon expenses and those rents are currently more than 10% lower than both the Net Program Rent and Restricted Market Rent.

(vi) [~~(D)~~] The units not receiving Project-based Section 8 Rental Assistance or rental assistance in association with USDA-RD-RHS financing, or not characterized as public housing do not propose rents that are less than the Project-based Section 8, USDA-RD-RHS financing, or public housing units.

§1.33. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Property rental rates or sales price and state conclusions as to the impact of the Property with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section.

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote de-

scribing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst (§2306.67055). The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (3) of this subsection.

(1) If not listed as approved by the Department, Market Analysts must submit subparagraphs (A) - (F) of this paragraph at least thirty days prior to the first day of the Application Acceptance Period for which the Market Analyst must be approved. To maintain status as an approved Qualified Market Analyst, updates to the items described in subparagraphs (A) - (C) of this paragraph must be submitted annually on the first Monday in February for review by the Department.

(A) Documentation of good standing in the State of Texas.

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis.

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis.

(D) General information regarding the firm's experience including references, the number of previous similar assignments and time frames in which previous assignments were completed.

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the application round in which each Market Analysis is submitted.

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the application round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least 90 days prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(3) The list of approved Qualified Market Analysts is posted on the Department's web site and updated within 72 hours of a change in the status of a Market Analyst.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include Property address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Property address or location, description of Property, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(5) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(6) Statement of Ownership. Disclose the current owners of record and provide a three year history of ownership for the subject Property.

(7) Secondary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Secondary Market Area definition. The entire PMA, as described in paragraph (8) of this subsection, must be contained within the Secondary Market boundaries. The Market Analyst must adhere to the methodology described in this paragraph when determining the secondary market area (§2306.67055).

(A) The Secondary Market Area will be defined by the Market Analyst with

(i) size based on a base year population of no more than 250,000 people for Developments targeting families, and

(ii) boundaries based on

(I) major roads,

(II) political boundaries, and

(III) natural boundaries.

(IV) A radius is prohibited as a boundary definition.

(B) The Market Analyst's definition of the Secondary Market Area must be supported with a detailed description of the methodology used to determine the boundaries. If applicable, the Market Analyst must place special emphasis on data used to determine an irregular shape for the Secondary Market.

(C) A scaled distance map indicating the Secondary Market Area boundaries that clearly identifies the location of the subject Property must be included.

(8) Primary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Primary Market Area definition. The Market Analyst must adhere

to the methodology described in this paragraph when determining the market area (§2306.67055).

(A) The Primary Market Area will be defined by the Market Analyst with

(i) size based on a base year population of no more than

(I) 100,000 people for Developments targeting the general population, and

(II) 250,000 people for Qualified Elderly Developments or Developments targeting special needs populations,

(ii) boundaries based on the most recent Census Tract definitions, as established by the U.S. Census Bureau

(I) major roads,

(II) political boundaries, and

(III) natural boundaries.

(IV) A radius is prohibited as a boundary definition.

(B) The Market Analyst's definition of the Primary Market Area must be supported with a detailed description of the methodology used to determine the boundaries. If applicable, the Market Analyst must place special emphasis on data used to determine an irregular shape for the PMA.

(C) A scaled distance map indicating the Primary Market Area boundaries that clearly identifies the location of the subject Property and the location of all Local Amenities must be included.

(9) Market Information.

(A) For each of the defined market areas, identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph; the data must be clearly labeled as relating to either the PMA or the Secondary Market, if applicable

(i) total housing,

(ii) rental developments,

(iii) Affordable Housing,

(iv) Comparable Units,

(v) Unstabilized Comparable Units, and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support both the overall demand conclusion for the proposed Development and the vacancy rate assumption used in underwriting the Development (§1.32(d)(1)(C) of this subchapter). State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by

(i) number of Bedrooms,

(ii) quality of construction (class),

(iii) Targeted Population, and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Turnover. The turnover rate should be specific to the Targeted Population. The data supporting the turnover rate must originate from documented turnover rates from at least one of the following

(i) Comparable Units,

(ii) the defined PMA,

(iii) the defined Secondary Market, and

(iv) a Third Party data collection agency or demographer.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available.

(i) Demographics.

(I) Population. Provide population and household figures, supported by actual demographics, for a five-year period with the year of application as the base year.

(II) Target. If applicable, adjust the household projections for the Qualified Elderly or special needs population targeted by the proposed Development. State the target adjustment rate.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit type by number of Bedrooms proposed and rent restriction category based on 1.5 persons per Bedroom (round up). State the Household Size-Appropriate adjustment rate.

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit type by number of Bedrooms proposed and rent restriction category with

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 35% for the general population and 40% for Qualified Elderly households, and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 1.5 persons per Bedroom (round up).

(-c-) State the Income Eligible adjustment rate.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). State the Tenure-Appropriate adjustment rate.

(ii) Demand from Turnover. Apply the turnover rate as described in subparagraph (D) of this paragraph to the target, income-eligible, size-appropriate and tenure-appropriate households in the PMA projected at the proposed placed in service date.

(iii) Demand from Population Growth. Calculate the target, income-eligible, size-appropriate and tenure-appropriate household growth in the PMA for the twelve month period following the proposed placed in service date.

(iv) Demand from Secondary Market Area.

(I) Apply the turnover rate as described in subparagraph (D) of this paragraph to the target, income-eligible, size-appropriate and tenure-appropriate households in the Secondary Market Area projected at the proposed placed in service date.

(II) Not more than [~~Only~~] 25% of the demand can come from outside the PMA as calculated in subclause (I) of this clause and [~~may~~] be included in the calculation of demand as described

in paragraph (10)(D) of this subsection and for use in calculation of inclusive capture rate as described in paragraph (10)(E) of this subsection. In addition, 25% of the Comparable Units from Unstabilized Developments within the Secondary Market Area must be included in the calculation of inclusive capture rate.

(v) Demand from Other Sources. The source of additional demand and the methodology used to calculate the additional demand must be clearly stated. Calculation of additional demand must factor in the adjustments described in clause (i) of this subparagraph.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (G) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand within the PMA.

(B) Rents. Provide a separate Market Rent [~~market rent~~] and Restricted Market Rent conclusion for each proposed Unit type by number of Bedrooms and rent restriction category. Conclusions of Market Rent or Restricted Market Rent below the maximum Net [~~net~~] Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §1.32(i) of this subchapter [~~title~~].

(i) Comparable Units. Identify developments in the PMA with Comparable Units. In Primary Market Areas lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable location adjustments. Provide a data sheet for each development consisting of

(I) Development name,

(II) address,

(III) year of construction and year of rehabilitation, if applicable,

(IV) property condition,

(V) population target,

(VI) unit mix specifying number of Bedrooms, number of baths, net rentable square footage and

(-a-) monthly rent, or

(-b-) sales price with terms, marketing period and date of sale,

(VII) description of concessions,

(VIII) list of unit amenities,

(IX) utility structure,

(X) list of common amenities, and

(XI) for rental developments only

(-a-) occupancy, and

(-b-) turnover.

(ii) Provide a scaled distance map indicating the Primary Market Area boundaries that clearly identifies the location of the subject Property and the location of the identified developments with Comparable Units.

(iii) Rent Adjustments. In support of the Market Rent and Restricted Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed unit type by number of Bedrooms and rental restriction category.

(I) The Department recommends use of HUD Form 92273.

(II) A minimum of three developments must be represented on each attribute adjustment matrix.

(III) Adjustments for concessions must be included, if applicable.

(IV) Total adjustments in excess of 15% must be supported with additional narrative.

(V) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent and Restricted Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) Demand. State the target, income-eligible, size-appropriate and tenure-appropriate household demand by Unit type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom units restricted at 50% of AMFI; two-Bedroom units restricted at 60% of AMFI) by summing the demand components applicable to the subject Development discussed in paragraph (9)(E)(ii) - (v) of this subsection. State the total target, income-eligible, size-appropriate and tenure-appropriate household demand by summing the demand components applicable to the subject Development discussed in paragraph (9)(E)(ii) - (v) of this subsection.

(E) Inclusive Capture Rate. The Market Analyst must calculate inclusive capture rates for the subject Development's proposed Unit types by number of Bedrooms and rent restriction categories, market rate Units, if applicable, and total Units. The Underwriter will adjust the inclusive capture rates to take into account any errors or omissions. To calculate an inclusive capture rate

(i) total

(I) the proposed subject Units,

(II) Comparable Units with priority, as defined in §49.9(d)(2) of this title, over the subject that have made application to TDHCA and have not been presented to the TDHCA Board for decision and

(III) Comparable Units in previously approved but Unstabilized Developments, and

(ii) divide by the total target, income-eligible, size-appropriate and tenure-appropriate household demand stated in subparagraph (D) of this paragraph.

(iii) Refer to §1.32(i) of this subchapter for feasibility criteria.

(F) Absorption. Project an absorption period for the subject Development to achieve Sustaining Occupancy. State the absorption rate.

(G) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing [~~program~~] Developments supported by Housing Tax Credits in the Primary Market (§2306.67055).

(11) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(12) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) All Applicants shall acknowledge, by virtue of filing an application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§1.34. Appraisal Rules and Guidelines.

(a) General Provision. An appraisal prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. The appraisal must include a statement that the report preparer has read and understood the requirements of this section.

(b) Self-Contained. An appraisal prepared for the Department must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions.

(c) Appraiser Qualifications. The qualifications of each appraiser are determined on a case-by-case basis by the Director of Real Estate Analysis or review appraiser, based upon the quality of the report itself and the experience and educational background of the appraiser. At minimum, a qualified appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(d) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report.

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject property which occurred within the past three years. Any pending agreements of sale, options to buy, or listing of the subject property must be disclosed in the appraisal report.

(6) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the site. Include a plat map and/or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and/or deed restrictions, where applicable, and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the highest and best use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (net rentable area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however; the report should disclose any potential environmental hazards (e.g., discolored vegetation, oil residue, asbestos-containing materials, lead-based paint etc.) noted during the inspection.

(8) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider paragraph (7)(A) - (E) of this subsection as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements (legally permissible, physically possible, feasible, and maximally productive) must be considered.

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the cost approach is not applicable.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) - (VII) of this clause should be made when applicable.

(I) Property rights conveyed.

(II) Financing terms.

(III) Conditions of sale.

(IV) Location.

(V) Highest and best use.

(VI) Physical characteristics (e.g., topography, size, shape, etc.).

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the reader with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Sales information should include address, legal description, tax assessor's parcel number(s), sales price, financing considerations and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three year sale history, complete description of the property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate, and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions, and physical features. Sufficient narrative must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable.

(II) Net Operating Income/Unit of Comparison. The net operating income statistics for the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section must contain an analysis of both the actual historical and projected income and expense aspects of the subject property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental units. The comparables must indicate current research for this specific property type. The comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The individual data sheets should include property address, lease terms, description of the property (e.g., unit type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The contract rents should be compared to the market-derived rents. A determination should be made as to whether the contract rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data and current occupancy level for the subject should be reported and compared to occupancy data from the rental comparables and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (e.g., IREM, BOMA, etc.). Any expense differences should be reconciled. Include historical data regarding the subject's assessment and tax rates and a statement as to whether or not any delinquent taxes exist.

(v) Capitalization. The appraiser should present the capitalization method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate (OAR) is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(10) Value Estimates. Reconciliation final value estimate is required.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current

sales comparables. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) Appraisal assignments for new construction are required to provide an "as completed" value of the proposed structures. These reports shall provide an "as restricted with favorable financing" value as well as an "unrestricted market" value.

(C) Reports on Properties to be rehabilitated shall address the "as restricted with favorable financing" value as well as both an "as is" value and an "as completed" value. The appraiser should consider the fee simple or leased fee interest as appropriate.

(D) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) and/or intangible items. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(11) Marketing Time. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(12) Photographs. Provide good quality color photographs of the subject property (front, rear, and side elevations, on-site amenities, interior of typical units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(e) Additional Appraisal Concerns. The appraiser(s) must be aware of Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§1.35. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department should be conducted and reported in conformity with the standards of the American Society for Testing and Materials. The initial report should conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E1527-05). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The environmental assessment shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to TDHCA as a User of the report (as defined by ASTM standards). Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The ESA report should also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the Environmental Site Assessment, and that the fee is in no way contingent upon the outcome of the assessment. The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must

(1) State if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) Provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the environmental site assessment or identified during the physical inspection;

(3) Provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map.

(4) If the subject site includes any improvements or debris from pre-existing improvements, state if testing for asbestos containing materials (ACMs) would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) If the subject site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(6) State if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements; and

(7) Assess the potential for the presence of Radon on the property, and recommend specific testing if necessary.

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Development Owner must act on such a recommendation or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as a TX-USDA-RHS funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this subsection. [~~Guidelines~~]

§1.36. Property Condition Assessment Guidelines.

(a) General Provisions. The objective of the Property Condition Assessment (the PCA) is to provide cost estimates for repairs, replacements, or new construction which are: immediately necessary; proposed by the developer; and expected to be required throughout the term of the regulatory period and not less than 30 years. The PCA prepared for the Department should be conducted and reported in conformity with the American Society for Testing and Materials "Standard Guide for Property Condition Assessments: Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018" except as provided for in subsections (b) and (c) of this section. <u>The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section.</u> The PCA must include discussion and analysis of the following:

(1) Useful Life Estimates. For each system and component of the property the PCA should assess the condition of the system or component, and estimate its remaining useful life, citing the basis or the source from which such estimate is derived.

(2) Code Compliance. The PCA should review and document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA adequately considers any and all applicable federal, state, and lo-

cal laws and regulations which may govern any work performed to the subject property.

(3) Program Rules. The PCA should assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, particular consideration being given to accessibility requirements, the Department's Housing Quality Standards, and any scoring criteria for which the Applicant may claim points.

(4) Cost Estimates for Repair and Replacement. It is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA provider is apprised of all development activities associated with the proposed transaction and consistency of the total immediately necessary and proposed repair and replacement cost estimates with the development cost schedule submitted as an exhibit of the Application.

(A) Immediately Necessary Repairs and Replacement. Systems or components which are expected to have a remaining useful life of less than one year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards should be considered immediately necessary repair and replacement. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional repair, replacement, or new construction above and beyond the immediate repair and replacement described in subparagraph (A) of this paragraph, such items must be identified and the nature or source of obsolescence or improvement to the operations of the Property discussed. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or new construction which is identified as being above and beyond the immediate need, citing the basis or the source from which such cost estimate is derived.

(C) Expected Repair and Replacement Over Time. The term during which the PCA should estimate the cost of expected repair and replacement over time must equal the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the property. The PCA must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The PCA must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred and no less than 15 years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

(b) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

(1) Fannie Mae's criteria for Physical Needs Assessments,

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments,

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports,

(4) TX-USDA-RHS guidelines for Capital Needs Assessment, or

(5) Standard and Poor's Property Condition Assessment Criteria: Guidelines for Conducting Property Condition Assessments, Multifamily Buildings.

(c) The Department may consider for acceptance reports prepared according to other standards which are not specifically named above in subsection (b) of this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(d) The PCA shall be conducted by a Third Party at the expense of the Applicant, and addressed to TDHCA as the client. Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The PCA report should also include a statement that the person or company preparing the PCA report will not materially benefit from the Development in any other way than receiving a fee for performing the PCA. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA should be signed and dated by the Third Party report provider not more than six months prior to the date of the application.

§1.37. Reserve for Replacement Rules and Guidelines.

(a) General Provisions. The Department will require Developments to provide regular maintenance to keep housing sanitary, safe and decent by maintaining a reserve for replacement in accordance with §2306.186. The reserve must be established for each unit in a Development of 25 or more rental units, regardless of the amount of rent charged for the unit. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section.

(b) The First Lien Lender shall maintain the reserve account through an escrow agent acceptable to the First Lien Lender to hold reserve funds in accordance with an executed escrow agreement and the rules set forth in this section and §2306.186.

(1) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond indenture or tax credit syndication, the Department shall

(A) Be a required signatory party in all escrow agreements for the maintenance of reserve funds;

(B) Be given notice of any asset management findings or reports, transfer of money in reserve accounts to fund necessary repairs, and any financial data and other information pursuant to the oversight of the Reserve Account within 30 days of any receipt or determination thereof;

(C) Subordinate its rights and responsibilities under the escrow agreement, including those described in this subsection, to the First Lien Lender or Bank Trustee through a subordination agreement subject to its ability to do so under the law and normal and customary limitations for fraud and other conditions contained in the Department's standard subordination clause agreements as modified from time to time, to include subsection (c) of this section.

(2) The escrow agreement and subordination agreement, if applicable, shall further specify the time and circumstances under which the Department can exercise its rights under the escrow agreement in order to fulfill its obligations under §2306.186 and as described in this section.

(3) Where the Department is the First Lien Lender and there is no Bank Trustee as a result of a bond indenture or tax credit syndication or where there is no First Lien Lender but the allocation of funds by the Department and §2306.186 requires that the Department oversee a Reserve Account, the Owner shall provide at their sole expense for appointment of an escrow agent acceptable to the Department to act as Bank Trustee as necessary under this section. The Department shall retain the right to replace the escrow agent with another Bank Trustee or act as escrow agent at a cost plus fee payable by the Owner due to breach of the escrow agent's responsibilities or otherwise with 30 days prior notice of all parties to the escrow agreement.

(c) If the Department is not the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet a signed certification by the First Lien Lender including:

(1) Reserve for replacement requirements under the first lien loan agreement;

(2) Monitoring standards established by the First Lien Lender to ensure compliance with the established reserve for replacement requirements; and

(3) A statement by the First Lien Lender

(A) That the Development has met all established reserve for replacement requirements; or

(B) Of the plan of action to bring the Development in compliance with all established reserve for replacement requirements, if necessary.

(d) If the Development meets the minimum unit size described in subsection (a) of this section and the establishment of a Reserve Account for repairs has not been required by the First Lien Lender or Bank Trustee, each Owner receiving Department assistance for multifamily rental housing shall set aside the repair reserve amount as described in subsection (e)(1) - (3) of this section through the date described in subsection (f)(2) of this section through the appointment of an escrow agent as further described in subsection (b)(3) of this section.

(e) If the Department is the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall deposit annually into a Reserve Account through the date described in subsection (f)(2) of this section:

(1) For new construction Developments:

(A) Not less than $150 per unit per year for units one to five years old; and

(B) Not less than $200 per unit per year for units six or more years old.

(2) For rehabilitation Developments:

(A) An amount per unit per year established by the Department's division responsible for credit underwriting based on the information presented in a Property Condition Assessment in conformance with §1.36 of this subchapter [~~title~~]; and

(B) Not less than $300 per unit per year.

(3) For either new construction or rehabilitation Developments, the Owner of a multifamily rental housing Development shall contract for a third-party Property Condition Assessment meeting the requirements of §1.36 of this subchapter and the Department will reanalyze the annual reserve requirement based on the findings and other support documentation.

(A) A Property Condition Assessment will be conducted:

(i) At appropriate intervals that are consistent with requirements of the First Lien Lender, other than the Department; or

(ii) At least once during each five-year period beginning with the 11th year after the awarding of any financial assistance for the Development by the Department, if the Department is the First Lien Lender or the First Lien Lender does not require a third-party Property Condition Assessment.

(B) Submission by the Owner to the Department will occur within 30 days of completion of the Property Condition Assessment and must include:

(i) The complete Property Condition Assessment;

(ii) First Lien Lender and/or Owner response to the findings of the Property Condition Assessment;

(iii) Documentation of repairs made as a result of the Property Condition Assessment; and

(iv) Documentation of adjustments to the amounts held in the replacement Reserve Account based upon the Property Condition Assessment.

(f) A Land Use Restriction Agreement or restrictive covenant between the Owner and the Department must require:

(1) The Owner to begin making annual deposits to the reserve account on the later of:

(A) The date that occupancy of the Development stabilizes as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date the property is at least 90% occupied; or

(B) The date that permanent financing for the Development is completely in place as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date when the permanent loan is executed and funded.

(2) The Owner to continue making deposits until the earliest of the following dates:

(A) The date on which the Owner suffers a total casualty loss with respect to the Development;

(B) The date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(C) The date on which the Development is demolished;

(D) The date on which the Development ceases to be used as a multifamily rental property; or

(E) The later of

(i) The end of the affordability period specified by the Land Use Restriction Agreement or restrictive covenant; or

(ii) The end of the repayment period of the first lien loan.

(g) The duties of the Owner of a multifamily rental housing Development under this section cease on the date of a change in own-

ership of the Development; however, the subsequent Owner of the Development is subject to the requirements of this section.

(h) If the Department is the First Lien Lender with respect to the Development or the First Lien Lender does not require establishment of a Reserve Account, the Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet:

(1) Financial statements, audited if available, with clear identification of the replacement Reserve Account balance and all capital improvements to the Development within the fiscal year;

(2) Identification of costs other than capital improvements funded by the replacement Reserve Account; and

(3) Signed statement of cause for:

(A) Use of replacement Reserve Account for expenses other than necessary repairs, including property taxes or insurance;

(B) Deposits to the replacement Reserve Account below the Department's or First Lien Lender's mandatory levels as defined in subsections (c), (d) and (e) of this section; and

(C) Failure to make a required deposit.

(i) If a request for extension or waiver is not approved by the Department, Department action, including a penalty of up to $200 per dwelling unit in the Development and/or characterization of the Development as Materially Non-Compliant, as defined in §60.1 of this title, may be taken when:

(1) A Reserve Account, as described in this section, has not been established for the Development;

(2) The Department is not a party to the escrow agreement for the Reserve Account;

(3) Money in the Reserve Account

(A) Is used for expenses other than necessary repairs, including property taxes or insurance; or

(B) Falls below mandatory deposit levels;

(4) Owner fails to make a required deposit;

(5) Owner fails to contract for the third party Property Condition Assessment as required under subsection (e)(3) of this section; or

(6) Owner fails to make necessary repairs, as defined in subsection (k) of this section.

(j) On a case by case basis, the Department may determine that the money in the Reserve Account may:

(1) Be used for expenses other than necessary repairs, including property taxes or insurance, if:

(A) Development income before payment of return to Owner or deferred developer fee is insufficient to meet operating expense and debt service requirements; and

(B) The funds withdrawn from the Reserve Account are replaced as cashflow after payment of expenses, but before payment of return to Owner or developer fee is available.

(2) Fall below mandatory deposit levels without resulting in Department action, if:

(A) Development income after payment of operating expenses, but before payment of return to Owner or deferred developer fee is insufficient to fund the mandatory deposit levels; and

(B) Subsequent deposits to the Reserve Account exceed mandatory deposit levels as cashflow after payment of operating expenses, but before payment of return to Owner or deferred developer fee is available until the Reserve Account has been replenished to the mandatory deposit level less capital expenses to date.

(k) The Department or its agent may make repairs to the Development if the Owner fails to complete necessary repairs indicated in the submitted Property Condition Assessment or identified by physical inspection. Repairs may be deemed necessary if the Development is notified of the Owner's failure to comply with federal, state and/or local health, safety, or building code.

(1) Payment for necessary repairs must be made directly by the Owner or through a replacement Reserve Account established for the Development under this section.

(2) The Department or its agent will produce a Request for Bids to hire a contractor to complete and oversee necessary repairs.

(l) This section does not apply to a Development for which the Owner is required to maintain a Reserve Account under any other provision of federal or state law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703900
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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CHAPTER 7. FIRST-TIME HOMEBUYER PROGRAM RULES

10 TAC §§7.1 - 7.9

The Texas Department of Housing and Community Affairs proposes new Chapter 7, §§7.1 - 7.9, concerning the Texas First-Time Homebuyer Program. The new chapter implements Subchapter MM of the Texas Government Code, Chapter 2306, as amended by H.B. 1637 and S.B. 1908 in the 80th regular legislative session, and other provisions of Texas Government Code, Chapter 2306, authorizing the Department to administer federal housing programs. The new chapter relates to the Department's operation and administration of the Texas First-Time Homebuyers Program which will facilitate the origination of single-family mortgage loans for eligible first-time homebuyers, down payment and closing cost assistance, and the issuance of mortgage credit certificates.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no additional cost to state or local governments as a result of enforcing or administering the new sections.

Mr. Gerber has also determined that for the first five-year period the new sections are in effect the public will benefit by making

financial assistance in the purchase of a home more available to first-time homebuyers. The need for such assistance has grown in the last several years because of increasing home prices. Mr. Gerber has also determined that for the first five-year period there will be no economic cost to individuals required to comply with the new sections and no adverse economic effect on small businesses.

Public hearings will be held across the state between September 24 and October 5 to receive public input on these new sections. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The new sections are proposed under Texas Government Code §2306.1073, which requires the department to adopt rules to administer the Texas First-Time Homebuyer Program, and Texas Government Code §2306.053(10) and (11) which authorize the department to provide for the administration of federal housing programs and establish eligibility criteria.

No other statutes, articles, or codes are affected by the proposed new sections.

§7.1. Purpose.

The purpose of the Texas First-Time Homebuyer Program is to facilitate the origination of single-family mortgage loans for eligible first-time homebuyers, provide to qualifying homebuyers down payment and closing cost assistance, and to make available to qualifying first-time homebuyers mortgage credit certificates.

§7.2. Definitions.

(a) Affidavit of eligible borrower--An affidavit substantially in the form of Exhibit A of the master mortgage origination agreement.

(b) Area median family income--The Department's determination, as permitted by §2306.123 of the Texas Government Code, of the median income of a family for an area using a source or methodology acceptable under federal law or rule. Percentages of the area median family income, as updated from time to time, may be found on the department's website in the "Combined Income and Purchase Price Limits Table."

(c) Areas of chronic economic distress--Those areas in the state, whether one or more, designated from time to time as areas of chronic economic distress by the state and approved by the Secretaries of Treasury and Housing and Urban Development pursuant to 26 USC §143(j), as amended from time to time, and related regulations.

(d) Contract for deed exception--The exception for certain mortgage loan eligibility requirements, as provided in the master mortgage origination agreement, available with respect to a principal residence owned under a contract for deed by a person whose family income is not more than 50% of the applicable median family income.

(e) Department--The Texas Department of Housing and Community Affairs.

(f) First-time homebuyer--A person who:

(1) resides in this state on the date on which an application is filed; and

(2) has not owned a home during the three years preceding the date on which an application under this program is filed, except if the application is with respect to a home in a targeted area. A person will be considered to have owned a home if the person had a present ownership interest in a home during the three years preceding the date on which the application was filed. In the event there is more than one person applying with respect to a home, each applicant must separately meet this three year requirement.

(g) Home--A dwelling in this state in which a first-time homebuyer intends to reside as the homebuyer's principal residence.

(h) Master mortgage origination agreement--The contract between the department and a mortgage lender, together with any amendments thereto, setting forth certain terms and conditions relating to the origination and sale of mortgage loans by the mortgage lender and the financing of such mortgage loans by the department.

(i) Maximum purchase price limit--The purchase price limits published and updated from time to time in the "Combined Income and Purchase Price Limits Table" found on the department's website.

(j) Mortgage credit certificate--Any certificate which:

(1) is issued under a qualified mortgage credit certificate program by the department;

(2) is issued to the first-time homebuyer/taxpayer in connection with the acquisition of the first-time homebuyer/taxpayer's principal residence; and

(3) specifies the certificate credit rate, and the certified indebtedness amount.

(k) Mortgage lender--A bank, trust company, savings bank, mortgage company, mortgage banker, credit union, national banking association, savings and loan association, life insurance company, or other financial institution authorized to transact business in this state and approved as a mortgage lender by the department.

(l) Present ownership interest--

(1) a fee simple interest;

(2) a joint tenancy, a tenancy in common or tenancy by the entirety;

(3) the interest of a tenant shareholder in a cooperative;

(4) a life estate;

(5) a land contract which does not fall within the contract for deed exception; or

(6) an interest held in trust for an a person that would constitute a present ownership interest if held directly by such person. The term, "present ownership interest" does not include:

(7) a remainder interest;

(8) a lease with or without an option to purchase;

(9) a mere expectancy to inherit an interest in a principal residence;

(10) the interest that a purchaser of a residence acquires on the execution of a purchase contract;

(11) a land contract which falls within the contract for deed exception; or

(12) an interest in other than a principal residence.

(m) Program--The Texas First-Time Homebuyer Program.

(n) Targeted areas--A census tract, as designated by the United States Secretary of Commerce, in which 70% or more of the families have incomes that are 80% or less of the statewide median income, such median income to be determined on the basis of the most recent

decennial census for which data are available, or an area of chronic economic distress.

§7.3. Administration of the Program.

(a) First-time homebuyer program eligibility requirements. To be eligible for any assistance under the program a first-time homebuyer must:

(1) qualify as a first-time homebuyer;

(2) be able to sign at loan closing an affidavit of eligible borrower; and

(3) apply with respect to a home whose purchase price does not exceed the maximum purchase price limit for the relevant area, and is either a new or existing single family residence, new or existing condominium or town home, or manufactured housing that has been converted to real property in accordance with the Texas Occupations Code Chapter 1201.

(b) Types of assistance available. Depending on the applicants' income, a first-time home buyer that applies for a loan under the program may also be eligible for down payment and closing cost assistance or mortgage credit certificates. Down payment and closing cost assistance or mortgage credit certificates may be awarded only in conjunction with an application for a mortgage loan.

(c) Income limits for loans. First-time homebuyers applying for a mortgage loan or a mortgage credit certificate must have an income of not more than 115 percent of area median family income or 140 percent of area median family income in targeted areas.

(d) Income limits for down payment and closing cost assistance. First-time homebuyers applying for down payment and closing cost assistance in conjunction with a mortgage loan must have an income of not more than 80 percent of area median family income.

(e) Application Procedure.

(1) Only applications filed on or after January 1, 2008 are subject to this Chapter.

(2) Applicants seeking assistance under the program must first contact a participating mortgage lender. A list of participating mortgage lenders may be obtained on the department's website or by contacting the department.

(3) All applicants shall complete an application with a participating mortgage lender and shall provide the following information at the time of application:

(A) written permission to obtain credit reports of the applicants on a form to be provided by the mortgage lender;

(B) an affidavit of Texas residency on a form to be provided by the mortgage lender;

(C) the most recent statements for all credit and bank accounts;

(D) pay stubs for the 3-month period prior to the month in which the application was filed;

(E) W-2 forms for the two most recent calendar years for which they are available;

(F) any information concerning debts that will not be paid off within twelve months of the date the application is filed, including, but not limited to the names of the associated creditors, account numbers and regular payment amounts;

(G) documentation of any other income or other form of support not evidenced above; and

(H) a copy of the executed sales contract for the subject property.

(f) Application Fees. Fees that may be collected by the mortgage lender from the first-time homebuyer relating to a mortgage loan include:

(1) an appropriate origination fee and buyer/seller points;

(2) all usual and reasonable settlement or financing costs that are permitted to be so collected by Federal Housing Administration ("FHA"), Veteran's Administration ("VA"), Rural Housing Services ("RHS"), Freddie Mac or Fannie Mae, as applicable, and other applicable laws, but only to the extent such charges do not exceed the usual and reasonable amounts charged in the area in which the home is located in cases where owner financing is not provided through a tax-exempt mortgage revenue bond financing. Such usual and reasonable settlement or financing costs shall include an application fee not to exceed $325 (which includes the funding fee and the tax compliance fee), the total estimated costs of a credit report on the applicants and an appraisal of the property to be financed with the mortgage loan, payable to the mortgage lender at or within ten (10) days of the application for a mortgage loan, title insurance survey fees, credit reference fees, legal fees, appraisal fees and expenses, credit report fees, FHA insurance premiums, private mortgage guaranty insurance premiums, VA guaranty fees, VA funding fees, RHS guaranty fees, hazard or flood insurance premiums, abstract fees, tax service fees, recording or registration fees, escrow fees, file preparation fees; and

(3) with respect to the issuance of mortgage credit certificates:

(A) an issuance fee;

(B) a non-refundable commitment fee; and

(C) a document handling fee.

§7.4. Criteria for Approving Participating Mortgage Lenders.

To be approved by the Board for participation in the program, a mortgage lender shall:

(1) have maintained a loan origination office in the state for at least one year. Operation through brokers, correspondent institutions or other agents must be approved by the department;

(2) be either:

(A) a Federal Housing Administration ("FHA") approved mortgagee;

(B) an eligible lender in good standing for Veteran's Administration ("VA") guaranteed mortgage loans;

(C) an eligible lender in good standing for Rural Housing Service's ("RHS") guaranteed rural housing loan program; or

(D) a lender currently participating in the conventional home lending market for loans originated in accordance with Fannie Mae's Mortgage-Backed Securities and/or Freddie Mac's requirements;

(3) have a minimum net worth as required by the program's master servicer;

(4) have a minimum warehouse line of credit as required by the program's master servicer;

(5) agree to originate mortgages and assign mortgages and servicing to the department's master servicer;

(6) originate, process, underwrite, close and fund originated loans in the mortgage lender's own name; and

(7) be an approved seller/servicer with the program's master servicer.

§7.5. Insurance Requirements.

Mortgage lenders must originate all mortgage loans in accordance with the loan origination, eligibility, credit underwriting standards, and applicable insurance requirements, in effect during the origination period for the applicable loan program (VA, FHA, USDA-RHS, or Fannie Mae/Freddie Mac Conventional).

§7.6. First-Time Homebuyer Occupancy and Use Requirements.

(a) Occupancy requirement. The first-time homebuyer must occupy the home within 60 days after the date of closing as required in the Affidavit of Eligible Borrower.

(b) Prohibited uses. First-time homebuyers may not use the property, or any part thereof, as an investment property, rental property, vacation or second home, or recreational home.

(c) Use for a business. First-time homebuyers may not use more than 15% of the residence in a trade or business (including childcare services) on a regular basis for compensation. If the residence is to be used, in part, for a trade or business, a schematic drawing from an appraiser must be provided.

§7.7. Contracts with Mortgage Lenders.

(a) As a condition precedent to participation in the program, a mortgage lender shall execute and deliver to the department the master mortgage origination agreement.

(b) The mortgage lender shall provide to the department certain other documents including a completed mortgage lender questionnaire, opinion of counsel to mortgage lender, and board resolution of mortgage lender, each in a form provided by the department.

(c) The department will provide to the mortgage lender notices of new bond programs and related guidelines. If the mortgage lender desires to participate in a bond program, the mortgage lender shall submit to the department an offer relating to such bond program.

§7.8. Conflicts with Bond Indentures and Applicable Law.

(a) All assistance provided under the program is funded from mortgage revenue bonds issued by the department and is subject to changes in the mortgage revenue bond indentures and applicable law. If there is a conflict between this chapter and any bond indenture or applicable law regarding the use of the funds from mortgage revenue bonds, the mortgage relevant bond indenture or applicable law shall control.

(b) Assistance under this program is dependent, in part, on the availability of funds. The department may cease offering all or a part of the assistance available under the program at any time and in its sole discretion.

§7.9. Waiver.

The Board, in its discretion and within the limits of federal and state law, may waive any one or more of these Rules if the Board finds that waiver is appropriate to fulfill the purposes or polices of Chapter 2306, Texas Government Code, or for good cause, as determined by the Board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703869

Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

CHAPTER 33. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.10

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of §§33.1 - 33.10, concerning the 2006 Multifamily Housing Revenue Bond Rules. The sections are proposed for repeal in order to promulgate new sections addressing the Department's 2008 Multifamily Housing Bond Program and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

Mr. Gerber has also determined that for each year of the first five-years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules for multifamily housing revenue bonds, thereby enhancing the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on this repeal. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The repeals are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§33.1. Introduction.

§33.2. Authority.

§33.3. Definitions.

§33.4. Policy Objectives and Eligible Developments.

§33.5. Bond Rating and Investment Letter.

§33.6. Application Procedures, Evaluation and Approval.

§33.7. Regulatory and Land Use Restrictions.

§33.8. Fees.

§33.9. Waiver of Rules.

§33.10. No Discrimination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703898
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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CHAPTER 33. 2008 MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.10

The Texas Department of Housing and Community Affairs proposes new §§33.1 - 33.10, concerning the 2008 Multifamily Housing Revenue Bond Rules. The new sections are proposed in order to implement changes that will improve the 2008 Private Activity Bond Program and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections as proposed.

Mr. Gerber has also determined that for each year of the first five-years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be the implementation of changes to the Department's Private Activity Bond Program for 2008, thereby enhancing the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on these new sections. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by these proposed new sections

§33.1. Introduction.

The purpose of this chapter is to state the Texas Department of Housing and Community Affairs (the "Department") requirements for issuing Bonds, the procedures for applying for multifamily housing revenue Bond financing, and the regulatory and land use restrictions imposed upon Developments financed with the issuance of Bonds for the 2008 Private Activity Bond Program Year. The rules and provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit Program. Applicants seeking a housing tax credit allocation should consult the Department's Qualified Allocation Plan and Rules ("QAP"), in effect for the program year for which the Housing Tax Credit application will be submitted. If the applicable QAP contradicts rules set forth in this chapter, the applicable QAP will take precedence over the rules in this chapter. The Department encourages the participation in the Multifamily Bond programs by working directly with Applicants, lenders, trustees, legal counsels, local and state officials and the general pubic to conduct business in an open, transparent and straightforward manner. The Department has simplified the process, within the limitation of statute, to affirmatively support and create affordable housing throughout the State of Texas.

§33.2. Authority.

The Department receives its authority to issue Bonds from Chapter 2306 of the Texas Government Code. All Bonds issued by the Department must conform to the requirements of the Act. Notwithstanding anything herein to the contrary, tax-exempt Bonds which are issued to finance the Development of multifamily rental housing are specifically subject to the requirements of the laws of the State of Texas, including but not limited to Chapter 2306 and Chapter 1372 of the Texas Government Code relating to Private Activity Bonds, and to the requirements of the Code (as defined in this chapter).

§33.3. Definitions.

The following words and terms, when used in the chapter, shall have the following meaning, unless context clearly indicates otherwise.

(1) Administrative Deficiency--As defined in §50.3(1) of this title.

(2) Applicant--As defined in §50.3(6) of this title.

(3) Application--as defined in §50.3(7) of this title.

(4) Board--The Governing Board of the Department.

(5) Bond--An evidence of indebtedness or other obligation, regardless of the sources of payment, issued by the Department under the Act, including a bond, note, or bond or revenue anticipation note, regardless of whether the obligation is general or special, negotiable, or nonnegotiable, in bearer or registered form, in certified or book entry form, in temporary or permanent form, or with or without interest coupons.

(6) Code--The U.S. Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued by the United States Department of the Treasury or the Internal Revenue Service.

(7) Development--As defined in §50.3(31) of this title.

(8) Development Owner--As defined in §50.3(34) of this title.

(9) Eligible Tenants--

(A) individuals and families of Extremely Low, Very Low and Low Income;

(B) Families of Moderate Income (in each case in the foregoing subparagraphs (A) and (B) of this paragraph as such terms are defined by the Issuer under the Act); and

(C) Persons with Special Needs, in each case, with an Anticipated Annual Income not in excess of 140% of the area median income for a four-person household in the applicable standard metropolitan statistical area; provided that all Low-Income Tenants shall count as Eligible Tenants.

(10) Extremely Low Income--The income received by an individual or family whose income does not exceed thirty percent (30%) of the area median income or applicable federal poverty line, as determined by the Act.

(11) Family of Moderate Income--A family:

(A) that is determined by the Board to require assistance taking into account:

(i) the amount of total income available for the housing needs of the individuals and family;

(ii) the size of the family;

(iii) the cost and condition of available housing facilities;

(iv) the ability of the individuals and family to compete successfully in the private housing market and to pay the amounts required by private enterprise for sanitary, decent, and safe housing; and

(v) standards established for various federal programs determining eligibility based on income; and

(B) that does not qualify as a family of Low Income.

(12) Ineligible Building Type--As defined in §50.3(52) of this title.

(13) Institutional Buyer--

(A) An accredited investor as defined in Regulation D promulgated under the Securities Act of 1933, as amended (17 CFR §230.501(a)), but excluding any natural person or any director or executive officer of the Department (17 CFR §§230.501(a)(4) - (6)); or

(B) A qualified institutional buyer as defined by Rule 144A promulgated under the Securities Act of 1935, as amended (17 CFR §230.144A).

(14) Intergenerational Housing--As defined in §50.3(55) of this title.

(15) Low Income--The income received by an individual or family whose income does not exceed eighty percent (80%) of the area median income or applicable federal poverty line, as determined by the Act.

(16) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest that encumbers the Development with respect to the requirements of law, including this chapter, the Act and Section 42 of the Code.

(17) New Construction--as defined in §50.3(63) of this title.

(18) Owner--An Applicant that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a Development subject to the regulatory powers of the Department and other terms and conditions required by the Department and the Act.

(19) Persons with Special Needs--Persons who:

(A) are considered to be disabled under a state or federal law;

(B) are elderly, meaning 60 years of age or older or of an age specified by an applicable federal program;

(C) are designated by the Board as experiencing a unique need for decent, safe housing that is not being met adequately by private enterprise; or

(D) are legally responsible for caring for an individual described by subparagraph (A), (B) or (C) of this paragraph and meet the income guidelines established by the Board.

(20) Private Activity Bonds--Any Bonds described by §141(a) of the Code.

(21) Private Activity Bond Program Scoring Criteria--The scoring criteria established by the Department for the Department's Multifamily Housing Revenue Bond Program, §33.6(e) of this chapter.

(22) Private Activity Bond Program Threshold Requirements--The threshold requirements established by the Department for the Department's Multifamily Housing Revenue Bond Program, §33.6(d) of this chapter.

(23) Program--The Department's Multifamily Housing Revenue Bond Program.

(24) Proper Site Control--Regarding the legal control of the land to be used for the Development, means the earnest money contract is in the name of the Applicant (principal or member of the General Partner); fully executed by all parties and escrowed by the title company.

(25) Property--The real estate and all improvements thereon, whether currently existing or proposed to be built thereon in connection with the Development, and including all items of personal property affixed or related thereto.

(26) Qualified 501(c)(3) Bonds--Any Bonds described by §145(a) of the Code.

(27) Rehabilitation--As defined in §50.3(81) of this title.

(28) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) Within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an urban area; or

(C) In an Area that is eligible for funding by Texas Rural Development Office of the United States Department of Agriculture (TRDO-USDA), other than an area that is located in a municipality with a population of more than 50,000.

(29) Rural Development--A Development or proposed Development that is located in a Rural Area, other than rural new construction Developments with more than 80 units.

(30) Tenant Income Certification--A certification as to income and other matters executed by the household members of each tenant in the Development, in such form as reasonably may be required by the Department in satisfaction of the criteria prescribed by the Secretary of Housing and Urban Development under §8(f)(3) of the Housing Act of 1937 ("the Housing Act") (42 U.S.C. 1437f) for purposes

of determining whether a family is a lower income family within the meaning of the §8(f)(1) of the Housing Act.

(31) Tenant Services--Social services, including child care, transportation, and basic adult education, that are provided to individuals residing in low income housing under Title IV-A, Social Security Act (42 U.S.C. §601 et seq.), and other similar services.

(32) Tenant Services Program Plan--The plan, subject to approval by the Department, which describes the Tenant Services to be provided by the Development Owner in a Development.

(33) Trustee--A national banking association organized and existing under the laws of the United States, as trustee (together with its successors and assigns and any successor trustee).

(34) TRDO-USDA--As defined in §50.3(94) of this title.

(35) Unit--As defined in §50.3(95) of this title.

(36) Very Low Income--The income received by an individual or family whose income does not exceed sixty percent (60%) of the area median income or applicable federal poverty line as determined under the Act.

§33.4. Policy Objectives and Eligible Developments.

The Department will issue Bonds to finance the rehabilitation, preservation or construction of decent, safe and affordable housing throughout the State of Texas. Eligible Developments may include those which are constructed, acquired, or rehabilitated and which provide housing for individuals and families of Low Income, Very Low Income, or Extremely Low Income, and Families of Moderate Income.

§33.5. Bond Rating and Investment Letter.

(a) Bond Ratings. All publicly offered Bonds issued by the Department to finance Developments shall have and be required to maintain a debt rating the equivalent of at least an "A" rating assigned to long-term obligations by Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc. or Moody's Investors Service, Inc. If such rating is based upon credit enhancement provided by an institution other than the Applicant or Development Owner, the form and substance of such credit enhancement shall be subject to approval by the Board, which approval shall be evidenced by adoption by the Board of a resolution authorizing the issuance of the credit-enhanced Bonds. Remedies relating to failure to maintain appropriate credit ratings shall be provided in the financing documents relating to the Development.

(b) Investment Letters. Bonds rated less than "A," or Bonds which are unrated must be placed with one or more Institutional Buyers and must be accompanied by an investment letter acceptable to the Department. Subsequent purchasers of such Bonds shall also be qualified as Institutional Buyers and shall sign and deliver to the Department an investment letter in a form acceptable to the Department. Bonds rated less than "A" and Bonds which are unrated shall be issued in physical form, in minimum denominations of one hundred thousand dollars ($100,000), and shall carry a legend requiring any purchasers of the Bonds to sign and deliver to the Department an investment letter in a form acceptable to the Department.

§33.6. Application Procedures, Evaluation and Approval.

(a) Application Costs, Costs of Issuance, Responsibility and Disclaimer. The Applicant shall pay all costs associated with the preparation and submission of the Application--including costs associated with the publication and posting of required public notices--and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any stage during the Application process, the Applicant is solely responsible for determining whether to proceed with the Application, and the Department disclaims any and all responsibility and liability in this regard.

(b) Pre-application. An Applicant who requests financing from the Department for a Development shall submit a pre-application in a format prescribed by the Department. Within fourteen (14) days of the Department's receipt of the pre-application, the Department will be responsible for federal, state, and local community notifications of the proposed Development. Upon review of the pre-application, if the Development is determined to be ineligible for Bond financing by the Department, the Department will send a letter to the Applicant explaining the reason for the ineligibility. If the Development is determined to be eligible for Bond financing by the Department, the Department will score and rank the pre-application based on the Private Activity Bond Program Scoring Criteria as described in subsection (d) of this section. The Department will rank the pre-application with higher scores ranking higher within each priority defined by §1372.0321, Texas Government Code. All Priority 1 Applications will be ranked above all Priority 2 Applications which will be ranked above all Priority 3 Applications, regardless of score, reflecting a priority structure which gives consideration to the income levels of the tenants and the rent levels of the units consistent with §2306.359. This priority ranking will be used throughout the calendar year. In the event two or more Applications receive the same score, the Department will use, as a tie-breaking mechanism, a priority first for Applications involving rehabilitation; then if a tie still exists, the Application with the greatest number of points awarded for Quality and Amenities for the Development; then if a tie still exists, the Department will grant preference to the pre-application with the lower number of net rentable square feet per bond amount requested. Pre-Applications must meet the threshold requirements as stated in the Private Activity Bond Program Threshold Requirements as set out in subsection (c) of this section. After scoring and ranking, the Development and the proposed financing structure will be presented to the Department's Board for consideration of a resolution declaring the Department's initial intent to issue Bonds (the "inducement resolution") with respect to the Development. After Board approval of the inducement resolution, the induced Applications will be submitted to the Texas Bond Review Board for its lottery, waiting list or carryforward processing in rank order. The Texas Bond Review Board will draw the number of lottery numbers that equates to the number of eligible Applications submitted by the Department for participation in lottery. The lottery numbers drawn will not equate to a specific Development. The Texas Bond Review Board will thereafter assign the lowest lottery number drawn to the highest ranked Application as previously determined by the Department. The Texas Bond Review Board will issue reservations of allocation for Applications submitted for the waiting list or carryforward in the order provided by the Department based on rank. The criteria by which a Development may be deemed to be eligible or ineligible are explained in subsection (j) of this section, entitled Eligibility Criteria. The Private Activity Bond Program Scoring Criteria will be posted on the Department's website.

(c) Approval of the inducement resolution does not guarantee final Board approval of the Bond Application. Department staff, for good cause, may recommend that the Board not approve an inducement resolution for an Application. The TDHCA Board reviews the Development as a whole for adherence to timelines and notification rules in the Qualified Allocation Plan and Rules, the need for the Development, compliance with local government rules and procedures, financial feasibility and the input of local and state officials and interested community members. These factors and others will be used to

make the final determination at the appropriate time. Because each Development is unique, making the final determination is often dependent on the issues presented at the time the Application is presented to the Board.

(d) Pre-Application Threshold Requirements.

(1) As the Department reviews the Application, the Department will use the following assumptions, even if not reflected by the Applicant in the Application. Prequalification Assumptions:

(A) Development Feasibility:

(i) Debt Coverage Ratio must be greater than or equal to 1.15;

(ii) Deferred Developer Fees are limited to 80% of Developer's Fees;

(iii) Contractor Fee, Overhead and General Requirements are limited to 14% of direct costs plus site work cost; and

(iv) Developer Fees cannot exceed 15% of the project's Total Eligible Basis.

(B) Construction Costs Per Unit Assumption. Costs not to exceed $75 per Unit for general population developments and $85 for elderly developments (Acquisition/Rehab developments are exempt from this requirement);

(C) Anticipated Interest Rate and Term. As stated in the Summary of Financing Participants in the pre-application;

(D) Size of Units (Acquisition/Rehab developments are exempt from this requirement):

(i) One bedroom Unit must be greater than or equal to 650 square feet for family and 550 square feet for senior Units.

(ii) Two bedroom Unit must be greater that or equal to 900 square feet for family and 750 square feet for senior Units.

(iii) Three bedroom Unit must be greater than or equal to 1,000 square feet for family.

(iv) Four bedroom Unit must be greater than or equal to 1200 square feet for family.

(2) Appropriate Zoning. Evidence of appropriate zoning for the proposed use or evidence of application made and pending decision;

(3) Executed Site Control. Properly executed and escrow receipted site control through December 1, 2007 with option to extend through March 1, 2008 for lottery Applications or 90 days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting for waiting list and carryforward Applications. The potential expiration of site control does not warrant the application being presented to the TDHCA Board prior to the scheduled meeting;

(4) Current Market Information (must support affordable rents);

(5) Completed current TDHCA Bond Pre-Application;

(6) Completed Multifamily Rental Worksheets;

(7) Certification of Local Elected Official request for neighborhood organization information and Public Notification Information;

(8) Completed 2008 Bond Review Board Residential Rental Attachment;

(9) Signed letter of Responsibility for All Costs Incurred;

(10) Signed Mortgage Revenue Bond Program Certification Letter;

(11) Evidence of Paid Application Fees ($1,000 to TDHCA, $1,500 to Vinson and Elkins and $5,000 to Bond Review Board);

(12) Boundary Survey or Plat clearly identifying the location and boundaries of the subject property;

(13) Local Area map showing the location of the Property and Community Services/Amenities within a three (3) mile radius;

(14) Utility Allowance documented from the Appropriate Local Housing Authority;

(15) Organization Chart showing the structure of the Applicant and the ownership structure of any principals of the Applicant with evidence of Entity Registration or Reservation with the Secretary of State; and

(16) Required Notification. Evidence of notifications shall include a copy of the exact letter and other materials that were sent to the individual or entity, a sworn affidavit stating that they made all the required notifications prior to the deadlines and a copy of the entire mailing list (including names and complete addresses) of all the recipients. Proof of notification must not be older than three months prior to the date of Application submission date. Notification must be sent to all the following individuals and entities (If the QAP and Rules in effect for the program year for which the Bond and Housing Tax Credit applications are submitted reflect a notification process that is different from the process listed in subparagraphs (A) - (F) of this paragraph, then the QAP and Rules will override the notification process listed in subparagraphs (A) - (F) of this paragraph):

(A) State Senator and Representative that represents the community containing the development;

(B) Presiding Officer of the governing body of any municipality containing the development and all elected members of that body (Mayor, City Council members);

(C) Presiding Officer of the governing body of the county containing the development and all elected members of that body (County Judge and/or Commissioners);

(D) School District Superintendent of the school district containing the development;

(E) Presiding Officer of the School Board of Trustees of the school district containing the development; and

(F) Evidence in the form of a certification that all of the notifications required under this paragraph have been made. Requests for Neighborhood Organizations under clause (i) of this subparagraph must be made by the deadlines described in that clause. Evidence of notification must meet the requirements identified in clause (ii) of this subparagraph to all of the individuals and entities identified in clause (iii) of this subparagraph.

(i) The Applicant must request Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site as follows:

(I) No later than twenty-one (21) days prior to the date the Application is submitted, the Applicant must e-mail, fax or mail with registered receipt a completed, "Neighborhood Organization Request" letter as provided in the Pre-Application materials to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and dis-

trict based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request neighborhood organizations from that source in the same format.

(II) If no reply letter is received from the local elected officials by seven (7) days prior to the Application submission, then the Applicant must certify to that fact with the "Pre-Application Notification Certification Form" provided in the Pre-Application materials.

(III) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as outlined by the local elected officials, or that the Applicant has knowledge of as of the Pre-Application Submission in the "Pre-Application Notification Certification Form" provided in the Pre-Application.

(ii) No later than the date the Pre-Application is submitted, Notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt in the format required in the "Pre-Application Notification Template" provided in the Pre-Application materials. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials. Evidence of Notification is required in the form of a certification in the "Pre-Application Notification Certification Form" provided in the Pre-Application materials. It is strongly encouraged that Applicants retain proof of notifications in the event the Department requires proof of Notification. Officials to be notified are those officials in office at the time the Pre-Application is submitted.

(I) Neighborhood Organizations on record with the city, state or county whose boundaries include the proposed Development Site as identified in clause (i)(III) of this subparagraph;

(II) Superintendent of the school district containing the Development;

(III) Presiding officer of the board of trustees of the school district containing the Development;

(IV) Mayor of any municipality containing the Development;

(V) All elected members of the governing body of any municipality containing the Development;

(VI) Presiding officer of the governing body of the county containing the Development;

(VII) All elected members of the governing body of the county containing the Development;

(VIII) State representative of the district containing the Development; and

(IX) State senator of the district containing the Development.

(iii) Each such notice must include, at a minimum, all of the following:

(I) The Applicant's name, address, individual contact name and phone number;

(II) The Development name, address, city and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Private Activity Bonds and Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Statement of whether the Development proposes New Construction or Rehabilitation;

(V) The type of Development being proposed (single family homes, duplex, apartments, townhomes, highrise etc.) and population being served (family, Intergenerational Housing, or elderly);

(VI) The approximate total number of Units and approximate total number of low-income Units;

(VII) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the percentage of Units that are market rate; and

(VIII) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Pre-Application, which are subject to change as annual changes in the area median income occur.

(17) All New Construction or Reconstruction units must provide the amenities in subparagraphs (A) - (I) of this paragraph. Rehabilitation (excluding Reconstruction) must provide the amenities in subparagraphs (B) - (I) of this paragraph unless expressly identified as not required (§2306.187).

(A) All new construction units must be wired with 6 pair CAT5e wiring or better to provide phone and data service to each unit and wired with COAX cable to provide TV and high speed internet data service to each unit;

(B) Blinds or window coverings for all windows;

(C) Energy-Star or equivalently rated dishwasher and disposal (not required for TRDO-USDA Developments);

(D) Energy-Star or equivalently rated Refrigerator;

(E) Energy-Star or equivalently rated Oven/Range;

(F) Exhaust/vent fans in bathrooms;

(G) Energy-Star or equivalently rated ceiling fans in living areas and bedrooms;

(H) Energy-Star or equivalently rated lighting in all Units; and

(I) Emergency 911 telephone accessible and available to tenants 24 hours a day.

(e) Pre-Application Scoring Criteria.

(1) Income and rent levels of the tenants: Priority 1 applications will receive 10 points, Priority 2 applications will receive 7 points and Priority 3 applications will receive 5 points.

(2) Construction Cost Per Unit includes: direct hard costs, site work, contractor profit, overhead, general requirements and contingency. Calculation will be hard costs per square foot of net rentable area. Must be greater than or equal to $75 per square foot for general population Developments and $85 per square foot for elderly Developments (1 point) (Acquisition/Rehab will automatically receive (1 point)).

(3) Size of Units. Average size of all Units combined in the development must be greater than or equal to 950 square foot for

family and must be greater than or equal to 750 square foot for elderly (5 points) (Acquisition/Rehab developments will automatically receive (5 points)).

(4) Period of Guaranteed Affordability for Low Income Tenants. Add 10 years of affordability after the extended use period for a total affordability period of 40 years (1 point).

(5) Quality and Amenities Substitutions in amenities will be allowed as long as the overall score is not affected. Applications in which Developments provide specific qualities and amenities at no extra charge to the tenant will be awarded points as follows: Acquisition/Rehab developments will receive 1.5 points for each item.

(A) Laundry Connections (2 points);

(B) Self-cleaning or continuous cleaning ovens (1 point);

(C) Microwave Ovens (in each Unit) (1 point);

(D) Refrigerator with icemaker (1 point);

(E) Laundry equipment (washer and dryers) for each Unit (3 points);

(F) Storage Room of approximately nine (9) square feet or greater (does not have to be in the unit but must be on the property) (1 point);

(G) Covered entries (1 point);

(H) Nine foot ceilings (1 point);

(I) Covered patios or covered balconies (1 point);

(J) Covered Parking (at least one per Unit) (3 points);

(K) Garages (equal to at least 35% of Units) (5 points);

(L) Ceiling Fans in all rooms except bathrooms and kitchens (light with ceiling fan in all bedrooms) (1 point);

(M) 75% or Greater Masonry (includes rock, stone, brick, stucco and cementious board product; excludes EIFS) (5 points);

(N) Thirty year architectural shingle roofing (1 point);

(O) Use of energy efficient alternative construction materials (structurally insulated panels) with wall insulation at a minimum of R-20 (3 points);

(P) R-15 Walls/R-30 Ceilings (rating of wall system) (3 points);

(Q) 14 SEER HVAC or evaporative coolers in dry climates for new construction or radiant barrier in the attic for the rehabilitation (3 points);

(R) Energy Star or equivalently rated kitchen appliances (2 points);

(S) One Children's Playscape Equipped for 5 to 12 years olds, or one Tot Lot--Only Family Developments Eligible (1 point);

(T) Two Children's Playscapes Equipped for 5 to 12 year olds, two Tot Lots, or one of each--Only Family Developments Eligible (2 points);

(U) Sport Court (Tennis, Basketball or Volleyball) (2 points);

(V) Enclosed sun porch or covered community porch/patio (2 points);

(W) BBQ Grills and Tables (at least one each per 50 Units) (1 point);

(X) Accessible walking path/jogging path separate from a sidewalk (1 point);

(Y) Full Perimeter Fencing (2 points);

(Z) Controlled access gate (1 point);

(AA) Equipped and functioning business center or equipped computer learning center with 1 computer and 1 fax machine for every 30 Units proposed in the Application, and 1 printer for every 2 computers (2 points);

(BB) Game Room or TV Lounge (2 points);

(CC) Furnished and staffed children's activity center--Only Family Developments Eligible (3 points);

(DD) Horseshoe pit, putting green or shuffleboard court) (1 point);

(EE) Furnished Fitness Center (equipped with at least five of the following fitness equipment options: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, stationary weight bench, sauna) (2 points);

(FF) Library with an accessible sitting area (separate from the community room) (1 point);

(GG) Gazebo with sitting area (1 point);

(HH) Covered Pavilion that includes barbeque grills and tables (2 points);

(II) Swimming pool (3 points);

(JJ) Community laundry room (with at least one front leading washer (1 point);

(KK) Furnished Community room (1 point);

(LL) Service coordinator office in addition to leasing offices (1 point);

(MM) Senior Activity Room (Arts and Crafts, etc.) (2 points);

(NN) Health Screening Room (1 point);

(OO) Secured Entry (elevator buildings only) (1 point);

(PP) Community Dining Room with full or warming kitchen--Only Qualified Elderly Developments Eligible (3 points);

(QQ) Community Theatre Room equipped with a 80 inch or larger screen with surround sound equipment, DVD player; and theatre seating (3 points).

(RR) Green Building (for example, passive solar heating/cooling, water conserving fixtures, collected water (at least 50%) for irrigation purposes, sub-metered electric meters, exceed energy star standards, photovoltaic panels for electricity and design and wiring for the use of such panels, construction waste management, provide recycle service, water permeable walkways and parking areas, or other Department approved items) (3 points);

(SS) Jacuzzi/Hot Tub (1 point)

(6) Tenant Services (Tenant Services shall include only direct costs (tenant services contract amount, supplies for services, internet connections, initial cost of computer equipment, etc.). Indirect costs such as overhead and utility allocations may not be included);

(A) $10.00 per Unit per month (10 points);

(B) $7.00 per Unit per month (5 points);

(C) $4.00 per Unit per month (3 points).

(7) Zoning appropriate for the proposed use or no zoning required appropriate zoning for the intended use must be in place at the time of Application submission date, September 4, 2007 (Applications submitted for lottery) or the submission dates listed on the Department's website for Applications submitted for waiting list and carryforward, in order to receive points (5 points).

(8) Proper Site Control (as defined in §33.3(24) of this chapter) through December 1, 2007 with option to extend through March 1, 2008 (Applications submitted for lottery) or 90 days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting. The potential expiration of site control does not warrant the application being presented to the TDHCA Board prior to the scheduled meeting. For Applications submitted for waiting list and carryforward all information must be correct at the time of the Application submission date, September 4, 2007 for Applications submitted for lottery or the submission dates listed on the Department's website for Applications submitted for waiting list or carryforward, in order to receive points (5 points).

(9) Development Support/Opposition Maximum net points of +24 to -24. Each letter will receive a maximum of +3 to -3. All letters received by 5:00 PM, October 1, 2007 for Applications submitted for lottery or fourteen (14) days prior to the date of the Board meeting at which the Application will be considered for Applications submitted for waiting list and carryforward will be used in scoring. The letter must specifically indicate support or opposition otherwise the letter will be considered neutral.

(A) Texas State Senator and Texas State Representative (maximum +3 to -3 points per official);

(B) Presiding officer of the governing body of any municipality containing the Development and the elected district member of the governing body of the municipality containing the Development (maximum +3 to -3 points per official);

(C) Presiding officer of the governing body of the county containing the Development and the elected district member of the governing body of the county containing the Development (if the site is not in a municipality, these points will be doubled) (maximum +3 to -3 points per official);

(D) Local School District Superintendent and Presiding Officer of the Board of Trustees for the School district containing the Development (maximum +3 to -3 points per official).

(10) Proximity to Community Services/Amenities Community services/amenities within three (3) miles of the site. A map must be included with the Application showing a three (3) mile radius notating where the services/amenities are located. (Acquisition/Rehab developments will receive 1.5 points for each item in subparagraphs (A) - (O) of this paragraph).

(A) Full service grocery store or supermarket (1 point);

(B) Pharmacy (1 point);

(C) Convenience store/mini-market (1 point);

(D) Retail Facilities (Target, Wal-Mart, Home Depot, Bookstores, etc.) (1 point);

(E) Bank/Financial Institution (1 point);

(F) Restaurant (1 point);

(G) Indoor public recreation facilities (community center, civic center, YMCA, museum) (1 point);

(H) Outdoor public recreation facilities (park, golf course, public swimming pool) (1 point);

(I) Fire/Police Station (1 point);

(J) Medical Facilities (hospitals, minor emergency, medical offices) (1 point);

(K) Public Library (1 point);

(L) Public Transportation (1/2 mile from site) (1 point);

(M) Public School (only one school required for point and only eligible with general population developments) (1 point);

(N) Dry Cleaners;

(O) Family Video Rental (i.e. Blockbuster, Hollywood Video, Movie Gallery) (1 point).

(11) Proximity to Negative Features adjacent to or within 300 feet of any part of the Development site boundaries. A map must be included with the application showing where the feature is located. Developer must provide a letter stating there are none of the negative features listed in subparagraphs (A) - (G) of this paragraph within the stated area if that is correct. (maximum negative 7 points)

(A) Junkyards (1 point deducted);

(B) Active Railways (excluding light rail) (1 point deducted);

(C) Heavy industrial/manufacturing plants (1 point deducted);

(D) Solid Waste/Sanitary Landfills (1 point deducted);

(E) High Voltage Transmission Towers within 100 feet (1 point deducted);

(F) Sexually Oriented Business (1 point deducted);

(G) Accident zones or flight paths for commercial or military airports (1 point deducted).

(12) Acquisition/Rehabilitation Developments will receive thirty (30) points. This will include the demolition of old buildings and new construction of the same number of units if allowed by local codes or less units to comply with local codes (not to exceed 252 total units).

(13) Preservation Developments will receive ten (10) points. This includes rehabilitation proposals on properties which are nearing expiration of an existing affordability requirement within the next two years or for which the there has been a rent restriction requirement in the past ten years. Evidence must be provided.

(14) Declared Disaster Areas. Applications will receive 7 points, if at the time the complete pre-application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development site is located in an area declared to be a disaster under §418.014 of the Texas Government Code. This includes Federal, State and Governor declared disaster areas.

(15) Developments in Census Tracts with No Other Existing Developments Supported by Tax Credits. Applications will receive 6 points if the proposed Development is located in a census tract in which there are no other existing developments that were awarded housing tax credits in the last 5 years and 3 points if there are no other existing developments that were awarded housing tax credits in the last 3 years. The applicant must provide evidence of the census tract in

which the Development is located. These census tracts are outlined in the 2008 Housing Tax Credit Site Demographic Characteristics Report.

(16) Notary Public Services for Tenants. Applications will receive 1 point for this item (§2306.6710(b)(3)) To receive this point, the Applicant must submit a certification that the Development will provide notary public services to the tenants at no cost to the tenant. This provision will be included in the Land Use Restriction Agreement and Regulatory Agreement.

(f) Multiple Site Applications. For the purposes of scoring, applicants must submit the required information as outlined in the Pre-Application Submission Manual. Each individual property will be scored on its own merits and the final score will be determined based on an average of all of the individual scores.

(g) Financing Commitments. After approval by the Board of the inducement resolution, and before submission of a final application, the Applicant will be solely responsible for making appropriate arrangements with financial institutions which are to be involved with the issuance of the Bonds or the financing of the Development, and to begin the process of obtaining firm commitments for financing from each of the financial institutions involved.

(h) Final Application. An Applicant who elects to proceed with submitting a final Application to the Department must submit the Volumes I and II of the Application, for Priority 1 and 2, prior to receipt of a reservation of allocation from the Texas Bond Review Board. For Priority 3 Applications the Volumes I and II must be submitted within fourteen (14) days of the reservation date from the Texas Bond Review Board. The Volume III of the Application and such supporting material as is required by the Department must be submitted at least sixty (60) days prior to the scheduled meeting of the Board at which the Development and the Bond issuance are to be considered, unless the Department directs the Applicant otherwise in writing. If the Applicant is applying for other Department funding then refer to the Rules for that program for Application submission requirements. The final application must adhere to the Department's QAP and Rules in effect for the program year for which the Bond and Housing Tax Credit applications are submitted. The Department may determine that supporting materials listed in the full application shall be provided subsequent to the final Application deadline in accordance with a schedule approved by the Department. Failure to provide any supporting materials in accordance with the approved schedule may be grounds for terminating the Application and returning the reservation to the Texas Bond Review Board.

(1) A Public Notification Sign shall be installed on the proposed Development site, regardless of Priority, within thirty (30) days of the Department's receipt of Volumes I and II. The applicant must certify to the fact that the sign was installed within 30 (thirty) days of Volume I and II submission and the date, time and location of the Bond Public Hearing must be included on the sign at least 30 (thirty) days prior to the hearing date. The sign must be at least four (4) feet by eight (8) feet in size and be located within twenty (20) feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day the TDHCA Board takes final action on the Application for the development. The information and lettering on the sign must meet the requirements identified in the Application. As an alternative to installing a Public Notification Sign and at the same required time, the Applicant may instead, at the Applicant's Option, mail written notification to all addresses located within the footage distance required by the local municipality zoning ordinance or 1,000 feet, if there is no local zoning ordinance or if the zoning ordinance does not require notification, of any part of the proposed Development site. This written notification must include the information otherwise required for the sign. If the Applicant chooses to provide this mailed notice in lieu of signage, the final Application must include a map of the proposed Development site and mark the 1,000 foot or local ordinance area showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. The Applicant must mail notice to any public official that changed from the submission of the pre-application to the submission of the final application and any neighborhood organization that is known and was not notified at the time of the pre-application submission. No additional notification is required unless the Applicant submitted a change in the Application that reflects a total Unit increase greater than 10%, an increase greater than 10% for any given AMFI, a decrease in the number of market rate units, or a change in the population being served (elderly, general population or transitional);

(2) Completed Uniform Application and Multifamily Rental Worksheets in the format required by the Department as posted to the Department's website.

(i) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made several times. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. All Administrative Deficiencies shall be clarified or corrected to the satisfaction of the Department within five business days. Failure to resolve all outstanding deficiencies within five business days will result in a penalty fee of $500 for each day the deficiency remains unresolved. Any Application with unresolved deficiencies after the 10th day from the issuance of the deficiency notice will be terminated. The Applicant will be responsible for the payment of any fees accrued pursuant to this section regardless of any termination pursuant to this section. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. The Application will not be presented to the Board for consideration until all outstanding fees have been paid.

(j) Eligibility Criteria. The Department will evaluate the Development for eligibility at the time of pre-application, and at the time of final Application. If there are changes to the Application that have an adverse affect on the score and ranking order and that would have resulted in the Application being placed below another Application in the ranking, the Department will terminate the Application and return the reservation to the Texas Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). The Development and the Applicant must satisfy the conditions set out in paragraphs (1) - (6) of this subsection in order for a Development to be considered eligible:

(1) The proposed Development must further meet the public purposes of the Department as identified in the Code.

(2) The proposed Development and the Applicant and its principals must satisfy the Department's Underwriting Rules and Guidelines (§1.32 of this title). The pre-application must include sufficient information for the Department to establish that the Underwriting Guidelines can be satisfied. The final Application will be thoroughly

underwritten according to the Underwriting Rules and Guidelines (§1.32 of this title).

(3) The Development must not be located on a site determined to be unacceptable for the intended use by the Department.

(4) Any Development in which the Applicant or principals of the Applicant have an ownership interest must be found not to be in Material Non-Compliance under the compliance Rules in effect at the time of pre-application submission. Any corrective action documentation affecting the Material Non-compliance status score must be submitted to the Department no later than thirty (30) days prior to final application submission.

(5) Neither the Applicant nor any principals of the Applicant is, at the time of Application:

(A) barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or

(B) has been convicted of a state or federal crime involving fraud, bribery, theft, misrepresentation, misappropriation of funds, or other similar criminal offenses within fifteen (15) years; or

(C) is subject to enforcement action under state or federal securities law, action by the NASD, subject to a federal tax lien, or the subject of an enforcement proceeding with any governmental entity; or

(D) neither applicant nor any principals of the applicant have a development under their ownership or control with a Material Non-compliance score as set out in the Department's Compliance Monitoring Policies and Procedures (Chapter 60 of this title); or

(E) otherwise disqualified or debarred from participation in any of the Department's programs.

(6) Neither the Applicant nor any of its principals may have provided any fraudulent information, knowingly false documentation or other intentional or negligent misrepresentation in the Application or other information submitted to the Department.

(7) An application may include either the rehabilitation or new construction, or both the rehabilitation and new construction, of qualified residential rental facilities located at multiple sites and with respect to which 51 percent or more of the residential units are located:

(A) in a county with a population of less than 75,000; or

(B) in a county in which the median income is less than the median income for the state, provided that the units are located in that portion of the county that is not included in a metropolitan statistical area containing one or more projects that are proposed to be financed, in whole or in part, by an issuance of bonds. The number of sites may be reduced as needed without affecting their status as a project for purposes of the application, provided that the final application for a reservation contains at least two sites (§1372.002)

(k) Bond Documents. After receipt of the final Application, bond counsel for the Department shall draft Bond documents which conform to the state and federal laws and regulations which apply to the transaction.

(l) Public Hearings; Board Decisions. For every Bond issuance, the Department will hold a public hearing in accordance with §2306.0661, Texas Government Code and §147(f) of the Code, in order to receive comments from the public pertaining to the Development and the issuance of the Bonds. The Applicant or member of the Development team must be present and will be responsible for conducting a brief presentation on the proposed Development and providing handouts at the hearing that should contain at a minimum, a description of the Development, maximum rents and income restrictions. If the proposed Development is an acquisition/rehabilitation then the presentation should include the scope of work that will be done to the property. All handouts must be submitted to the Department for review at least two (2) days prior to the public hearing. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant. The Board's decisions on approvals of proposed Developments will consider all relevant matters. Any topics or matters, alone or in combination, may or may not determine the Board's decision. The Department's Board will consider the following topics in relation to the approval of a proposed Development:

(1) The developer market study;

(2) The location;

(3) The compliance history of the developer;

(4) The financial feasibility;

(5) The appropriateness of the Development's size and configuration in relation to the housing needs of the community in which the Development is located;

(6) The Development's proximity to other low income Developments;

(7) The availability of adequate public facilities and services;

(8) The anticipated impact on local school districts;

(9) Zoning and other land use considerations;

(10) Any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes; and

(11) Other good cause as determined by the Board.

(m) Approval of the Bonds.

(1) Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board, upon presentation by the Department's staff, will consider the approval of the Bond issuance, final Bond documents and, in the instance of privately placed Bonds, the pricing of the Bonds. The process for appeals and grounds for appeals may be found under §1.7 and §1.8 of this title. The Department's conduit housing transactions will be processed in accordance with the Texas Bond Review Board rules 34 TAC Part 9, Chapter 181, Subchapter A and Chapter 1372, Texas Government Code. The Bond issuance must receive an approving opinion from the Department's bond counsel with respect to the legality and validity of the Bonds and the security therefore, and in the case of tax-exempt Bonds, with respect to the excludability from gross income for federal income tax purposes of interest on the Bonds.

(2) Alternative Dispute Resolution Policy. The Department encourages use of Alternative Dispute Resolution methods as outlined in §1.17 of this title.

(n) Local Permits. Prior to the closing of the Bonds, all necessary approvals, including building permits, from local municipalities, counties, or other jurisdictions with authority over the Development must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees must be provided to the Department.

(o) Closing. If there are changes to the Application prior to closing that have an adverse affect on the score and ranking order that would have resulted in the Application being placed below another Application in the ranking, the Department will terminate the Application and return the reservation to the Texas Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). Once all approvals have been obtained and Bond documents have been finalized to the respective parties' satisfaction, the Bond transaction will close. Any outstanding Housing Trust Fund Pre-Development loans for the proposed Development site must be paid in full at the time the bond transaction is closed. All Applicants are subject to §1.13 of this title. Upon satisfaction of all conditions precedent to closing, the Department will issue Bonds in exchange for payment thereof. The Department will then loan the proceeds of the Bonds to the Applicant and disbursements of the proceeds may begin.

§33.7. Regulatory and Land Use Restrictions.

(a) Filing and Term of LURA. A Regulatory and Land Use Restriction Agreement or other similar instrument (the "LURA"), will be filed in the property records of the county in which the Development is located for each Development financed from the proceeds of Bonds issued by the Department. For Developments involving new construction, the term of the LURA will be the longer of 30 years, the period of guaranteed affordability or the period for which Bonds are outstanding. For the financing of an existing Development, the term of the LURA will be the longer of the longest period which is economically feasible in accordance with the Act, or the period for which Bonds are outstanding.

(b) Development Occupancy. The LURA will specify occupancy restrictions for each Development based on the income of its tenants, and will restrict the rents that may be charged for Units occupied by tenants who satisfy the specified income requirements. Pursuant to §2306.269, Texas Government Code, the LURA will prohibit a Development Owner from excluding an individual or family from admission to the Development because the individual or family participates in the housing choice voucher program under Section 8, United States Housing Act of 1937 (the "Housing Act"), and from using a financial or minimum income standard for an individual or family participating in the voucher program that requires the individual or family to have a monthly income of more than two and one half (2.5) times the individual's or family's share of the total monthly rent payable to the Development Owner of the Development. Development occupancy requirements must be met on or prior to the date on which Bonds are issued unless the Development is under construction. Adequate substantiation that the occupancy requirements have been met, in the sole discretion of the Department, must be provided prior to closing. Occupancy requirements exclude Units for managers and maintenance personnel that are reasonably required by the Development.

(c) Set Asides.

(1) Developments which are financed from the proceeds of Private Activity Bonds or from the proceeds of Qualified 501(c)(3) Bonds must be restricted under one of the following two minimum set-asides:

(A) at least twenty percent (20%) of the Units within the Development that are available for occupancy shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed fifty percent (50%) of the area median income, or

(B) at least forty percent (40%) of the Units within the Development that are available for occupancy shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed sixty percent (60%) of the area median income.

(2) The Development Owner must designate at the time of Application which of the two set-asides will apply to the Development and must also designate the selected priority for the Development in accordance with §1372.0321, Texas Government Code. Units intended to satisfy set-aside requirements must be distributed evenly throughout the Development, and must include a reasonably proportionate amount of each type of Unit available in the Development.

(3) No tenant qualifying under either of the set-asides shall be denied continued occupancy of a Unit in the Development because, after commencement of such occupancy, such tenant's income increases to exceed the qualifying limit; provided, however, that, should a tenant's income, as of the most recent determination thereof, exceed 140% of the then applicable income limit and such tenant constitutes a portion of the set-aside requirement of this section, then such tenant shall only continue to qualify for so long as no Unit of comparable or smaller size is rented to a tenant that does not qualify as a Low-Income Tenant. (Required federal set-aside requirements)

(d) Global Income Requirement. All of the Units that are available for occupancy in Developments financed from the proceeds of Private Activity Bonds or from the proceeds of Qualified 501(c)(3) Bonds shall be occupied or held vacant (in the case of new construction) and available for occupancy at all times by persons or families whose income does not exceed one hundred and forty percent (140%) of the area median income for a four-person household.

(e) Qualified 501(c)(3) Bonds. Developments which are financed from the proceeds of Qualified 501(c)(3) Bonds are further subject to the restriction that at least seventy-five percent (75%) of the Units within the Development that are available for occupancy shall be occupied (or, in the case of new construction, held vacant and available for occupancy until such time as initial lease-up is complete) at all times by individuals and families of Low Income (less than or equal to 80% of AMFI).

(f) Taxable Bonds. The occupancy requirements for Developments financed from the issuance of taxable Bonds will be negotiated, considered and approved by the Department on a case by case basis.

(g) Fair Housing. All Developments financed by the Department must comply with the Fair Housing Act which prohibits discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, national origin, familial status, and disability. The Fair Housing Act also mandates specific design and construction requirements for multifamily housing built for first occupancy after March 13, 1991, in order to provide accessible housing for individuals with disabilities.

(h) Tenant Services. The LURA will require that the Development Owner offer a variety of services for residents of the Development through a Tenant Services Program Plan which is subject to annual approval by the Department.

(i) Land Use Restriction Agreement. Requirements as defined in Chapter 60, Subchapter A of this title.

§33.8. Fees.

(a) Application and Issuance Fees. The Applicant is required to submit, at the time of pre-application, the following fees: $1,000 (payable to TDHCA), $1,500 (payable to Vinson & Elkins, the Department's Bond Counsel) and $5,000 (payable to the Texas Bond Review Board (BRB)) These fees cover the costs of pre-application review and filing fees to the BRB. The Department shall set fees to be paid by the Applicant in order to cover the costs of pre-application review, Application and Development review, the Department's expenses in connec-

tion with providing financing for a Development, and as required by law. (§1372.006(a), Texas Government Code). At the time of full application the Applicant is required to submit a tax credit application fee of $30/unit and $10,000 for the bond application fee (for multiple site Applications $10,000 or $30/unit, whichever is greater, for the bond application fee. At the closing of the bonds the following fees are required, an issuance fee equal to 50 basis points (0.005) of the issued bond amount, administration fee equal to 20 basis points (0.002) and a compliance fee equal to $40/unit.

(b) Annual Administration, Portfolio Management and Compliance, and Asset Management Fees. The Department shall set ongoing fees to be paid by Development Owners to cover the Department's costs of administering the Bonds, portfolio management and compliance with the program requirements applicable to each Development and asset management applicable requirements. The annual compliance fee is paid in advance and is equal to $40/unit beginning two years from the first payment date; the asset management fee is paid in advance and is equal to $25/unit beginning two years from the first payment date; both are adjusted annually for CPI. The annual administration fee is paid in arrears and is equal to 10 basis points (0.001) of the outstanding bond amount beginning three years from the closing date. These fees are paid for a minimum of thirty (30) years or as long as the bonds are out standing.

§33.9. Waiver of Rules.

Provided all requirements of the Act, the Code, and any other applicable law are met, the Board may waive any one or more of the Rules set forth in §§33.3 - 33.8 of this chapter relating to the Multifamily Housing Revenue Bond Program in order to further the purposes and the policies of Chapter 2306, Texas Government Code; to encourage the acquisition, construction, reconstruction, or rehabilitation of a Development that would provide decent, safe, and sanitary housing, including, but not limited to, providing such housing in economically depressed or blighted areas, or providing housing designed and equipped for Persons with Special Needs; or for other good cause, as determined by the Board.

§33.10. No Discrimination.

The Department and its staff or agents, Applicants, Development Owners, and any participants in the Program shall not discriminate under this Program against any person or family on the basis of race, creed, national origin, age, religion, handicap, family status, or sex, or against persons or families on the basis of their having minor children, except that nothing herein shall be deemed to preclude a Development Owner from selecting tenants with Special Needs, or to preclude a Development Owner from selecting tenants based on income in renting Units to comply with the set asides under the provisions of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703899
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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CHAPTER 50. 2006 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.23

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC §§50.1 - 50.23, concerning the 2006 Housing Tax Credit Program Qualified Allocation Plan and Rules. The sections are proposed to be repealed in order to promulgate new sections conforming to the requirements of laws enacted under the Internal Revenue Code of 1986, §42, as amended, which provides for credits against federal income taxes for owners of qualified low income rental housing and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Michael Gerber, Executive Director, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

Mr. Gerber has also determined that for each year of the first five-years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules for the allocation of low income housing tax credit authority within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the tax credit program administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on these repeals. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The repeals are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 and the Internal Revenue Code of 1986, §42, as amended, which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by these proposed repeals.

§50.1. Purpose and Authority; Program Statement; Allocation Goals.
§50.2. Coordination with Rural Agencies.
§50.3. Definitions.
§50.4. State Housing Credit Ceiling.
§50.5. Ineligibility; Disqualification and Debarment; Certain Applicant and Development Standards; Representation by Former Board

Member or Other Person; Due Diligence, Sworn Affidavit; Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment.

§50.6. Site and Development Restrictions: Floodplain; Ineligible Building Types; Scattered Site Limitations; Credit Amount; Limitations on the Size of Developments; Limitations no Rehabilitation Costs; Unacceptable Sites; Appeals and Administrative Deficiencies for Site and Development Restrictions.

§50.7. Regional Allocation Formula; Set-Asides; Redistribution of Credits.

§50.8. Pre-Application: Submission; Communication with Departments Staff; Evaluation Process; Threshold Criteria and Review; Results. (2306.6704).

§50.9. Application: Submission; Communication with Department Employees; Adherence to Obligations; Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling; Evaluation Process for Tax-Exempt Bond Development Applications; Evaluation Process for Rural Rescue Applications Under the 2007 Credit Ceiling; Experience Pre-Certification Procedures; Threshold Criteria; Selection Criteria; Tiebreaker Factors; Staff Recommendations.

§50.10. Board Decisions; Waiting List; Forward Commitments.

§50.11. Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants; Viewing of Pre-Applications and Applications; Confidential Information.

§50.12. Tax-Exempt Bond Developments: Filing of Applications; Applicability of Rules; Supportive Services; Financial Feasibility Evaluation; Satisfaction of Requirements.

§50.13. Commitment and Determination Notices; Agreement and Election Statement; Documentation Submission Requirements.

§50.14. Carryover; 10% Test; Commencement of Substantial Construction.

§50.15. LURA, Cost Certification.

§50.16. Housing Credit Allocations.

§50.17. Board Reevaluation, Appeals Process; Provision of Information or Challenges Regarding Applications; Amendments; Housing Tax Credit and Ownership Transfers; Sale of Tax Credit Properties; Withdrawals; Cancellations; Alternative Dispute Resolution.

§50.18. Compliance Monitoring and Material Noncompliance.

§50.19. Department Records; Application Log; IRS Filings.

§50.20. Program Fees; Refunds; Public Information Requests; Adjustments of Fees and Notification of Fees; Extensions; Penalties.

§50.21. Manner and Place of Filing All Required Documentation.

§50.22. Waiver and Amendment of Rules.

§50.23. Deadlines for Allocation of Housing Tax Credits. (2306.6724).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703904
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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CHAPTER 50. 2008 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.23

The Texas Department of Housing and Community Affairs proposes new §§50.1 - 50.23, concerning the 2008 Housing Tax Credit Program Qualified Allocation Plan and Rules. The new sections are necessary to provide procedures for the allocation by the Department of certain housing tax credits available under federal income tax laws to owners of qualified rental housing developments and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Mr. Gerber has also determined that for each year of the first five-years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be the enhancement of the state's ability to provide safe and sanitary housing for Texans through the efficient and coordinated allocation of federal income tax credit authority available to the state for administration of state housing agencies. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on these new sections. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 and the Internal Revenue Code of 1986, §42, as amended, which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the new sections.

§50.1. Purpose and Authority; Program Statement; Allocation Goals.

(a) Purpose and Authority. The Rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of Housing Tax Credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, (the "Code") as amended, provides for credits against federal income taxes for owners of qualified low-income rental housing Developments. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Chapter

2306, Subchapter DD, Texas Government Code, the Department is authorized to make Housing Credit Allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed this Qualified Allocation Plan (QAP) which is set forth in §§50.1 - 50.23 of this chapter. Sections in this chapter establish procedures for applying for and obtaining an allocation of Housing Tax Credits, along with ensuring that the proper threshold criteria, selection criteria, priorities and preferences are followed in making such allocations.

(b) Program Statement. The Department shall administer the program to encourage the development and preservation of appropriate types of rental housing for households that have difficulty finding suitable, accessible, affordable rental housing in the private marketplace; maximize the number of suitable, accessible, affordable residential rental units added to the state's housing supply; prevent losses for any reason to the state's supply of suitable, accessible, affordable residential rental units by enabling the Rehabilitation of rental housing or by providing other preventive financial support; and provide for the participation of for-profit organizations and provide for and encourage the participation of nonprofit organizations in the acquisition, development and operation of accessible affordable housing developments in rural and urban communities. (§2306.6701)

(c) Allocation Goals. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state, and in accordance with the regional allocation formula; to promote maximum utilization of the available tax credit amount; and to allocate credits among as many different entities as practicable without diminishing the quality of the housing that is being built. The processes and criteria utilized to realize this goal are described in §§50.7, 50.8 and 50.9 of this chapter, without in any way limiting the effect or applicability of all other provisions of this chapter. (General Appropriation Act, Article VII, Rider 8(e))

§50.2. Coordination with Rural Agencies.

To ensure maximum utilization and optimum geographic distribution of tax credits in rural areas, and to provide for sharing of information, efficient procedures, and fulfillment of Development requirements in rural areas, the Department will coordinate on existing, Rehabilitation, and New Construction housing Developments financed by TRDO-USDA; and will administer the Rural Regional Allocation with the Texas Office of Rural Community Affairs (ORCA). Through participation in hearings and meetings, ORCA will assist in developing all Threshold, Selection and Underwriting Criteria applied to Applications eligible for the Rural Regional Allocation. The Criteria will be approved by that Agency. To ensure that the Rural Regional Allocation receives a sufficient volume of eligible Applications, the Department and ORCA shall jointly implement outreach, training, and rural area capacity building efforts. (§2306.6723)

§50.3. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Administrative Deficiencies--The absence of information or inconsistent information in the Application as is required under §§50.5, 50.6, 50.8 and 50.9 of this chapter, unless determined by the Department as unable to be corrected.

(2) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with an ownership interest unless the entity is an experienced developer as described in §50.9(h)(9)(D) of this chapter.

(3) Agreement and Election Statement--A document in which the Development Owner elects, irrevocably, to fix the Applicable Percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Development Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings.

(4) Applicable Fraction--The fraction used to determine the Qualified Basis of the qualified low-income building, which is the smaller of the Unit fraction or the floor space fraction, all determined as provided in the Code, §42(c)(1).

(5) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit for any Development (New Construction, Reconstruction, and/or Rehabilitation), as defined more fully in the Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be projected at:

(i) 40 basis points over the current applicable percentage for 70% present value credits, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department, or

(ii) 15 basis points over the current applicable percentage for 30% present value credits, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based in order of priority on:

(i) The percentage indicated in the Agreement and Election Statement, if executed; or

(ii) The actual applicable percentage as determined by the Code, §42(b), if all or part of the Development has been placed in service and for any buildings not placed in service the percentage will be the actual percentage as determined by the Code, §42(b) for the most current month; or

(iii) The percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(6) Applicant--Any Person or Affiliate of a Person who files a Pre-Application or an Application with the Department requesting a Housing Credit Allocation. (§2306.6702)

(7) Application--An application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material. (§2306.6702)

(8) Application Acceptance Period--That period of time during which Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department, December 3, 2007 through February 29, 2008, as more fully described in §§50.8 - 50.12 of this chapter. For Tax-Exempt Bond Developments this period is the date the Volumes 1 and 2 are submitted or the date the reservation is issued by the Texas Bond Review Board, whichever is earlier.

(9) Application Round--The period beginning on the date the Department begins accepting Applications for the State Housing Credit Ceiling and continuing until all available Housing Tax Credits from the State Housing Credit Ceiling (as stipulated by the Department)

are allocated, but not extending past the last day of the calendar year. (§2306.6702)

(10) Application Submission Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for the filing of Pre-Applications and Applications for Housing Tax Credits.

(11) Area--

(A) The geographic area contained within the boundaries of:

(i) An incorporated place or

(ii) Census Designated Place (CDP) as established by the U.S. Census Bureau for the most recent Decennial Census.

(B) For Developments located outside the boundaries of an incorporated place or CDP, the Development shall take up the Area characteristics of the incorporated place or CDP whose boundary is nearest to the Development site.

(12) Area Median Gross Income (AMGI)--Area median gross household income, as determined for all purposes under and in accordance with the requirements of the Code, §42.

(13) At-Risk Development--A Development that: (§2306.6702)

(A) has received the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive under at least one of the following federal laws, as applicable:

(i) Sections 221(d)(3) and (5), National Housing Act (12 U.S.C. §17151);

(ii) Section 236, National Housing Act (12 U.S.C. §1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. §1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. §1701s);

(v) The Section 8 Additional Assistance Program for housing Developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development;

(vi) The Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development;

(vii) Sections 514, 515, and 516, Housing Act of 1949 (§42 U.S.C. §§1484, 1485, and 1486); or

(viii) Section 42, of the Internal Revenue Code of 1986 (26 U.S.C. §42), and

(B) Is subject to the following conditions:

(i) The stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two calendar years of July 31 of the year the Application is submitted); or

(ii) The federally insured mortgage on the Development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two calendar years of July 31 of the year the Application is submitted).

(C) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in subparagraph (A) of this paragraph will not qualify as an At-Risk Development unless the redevelopment will include the same site.

(D) Developments must be at risk of losing all affordability from all of the financial benefits available on the Development, provided such benefit constitutes a subsidy, described in subparagraph (A) of this paragraph on the site. However, Developments that have an opportunity to retain or renew any of the financial benefit described in subparagraph (A) of this paragraph must retain or renew all possible financial benefit to qualify as an At-Risk Development.

(E) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a qualified contract under §42 of the Code. Evidence must be provided in the form of a copy of the recorded LURA, the first years' IRS Forms 8609 for all buildings showing Part II completed and, if applicable, documentation from the original application regarding the right of first refusal.

(14) Bedroom--A portion of a Unit which is no less than 100 square feet; has no width or length less than 8 feet; has at least one window that provides exterior access; and has at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to accommodate 5 feet of hanging space. A den, study or other similar space that could reasonably function as a bedroom and meets this definition is considered a bedroom.

(15) Board--The governing Board of the Department. (§2306.004)

(16) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(C) and Treasury Regulations, §1.42-6.

(17) Carryover Allocation Document--A document issued by the Department, and executed by the Development Owner, pursuant to §50.14(a) of this chapter.

(18) Carryover Allocation Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing Carryover Allocation requests.

(19) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service.

(20) Colonia--A geographic Area that is located in a county some part of which is within 150 miles of the international border of this state, that consists of 11 or more dwellings that at located in close proximity to each other in an area that may be described as a community or neighborhood, and that (2306.581):

(A) Has a majority population composed of individuals and families of low-income and very low-income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed Area under §17.921, Water Code; or

(B) Has the physical and economic characteristics of a colonia, as determined by the Department.

(21) Commitment Notice--A notice issued by the Department to a Development Owner pursuant to §50.13 of this chapter and also referred to as the "commitment."

(22) Community Revitalization Plan--A published document under any name, approved and adopted by the local governing body by ordinance or resolution, that targets specific geographic areas for revitalization and development of residential developments.

(23) Competitive Housing Tax Credits--Tax credits available from the State Housing Credit Ceiling.

(24) Compliance Period--With respect to a building, the period of 15 taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(25) Control--(including the terms "Controlling," "Controlled by", and/or "under common Control with") the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing General Partner of a limited liability company.

(26) Cost Certification Procedures Manual--The manual produced, and amended from time to time, by the Department which sets forth procedures, forms, and guidelines for filing requests for IRS Form(s) 8609 for Developments placed in service under the Housing Tax Credit Program.

(27) Credit Period--With respect to a building within a Development, the period of ten taxable years beginning with the taxable year the building is placed in service or, at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(28) Department--The Texas Department of Housing and Community Affairs, an agency of the State of Texas, established by Chapter 2306, Texas Government Code, including Department employees and/or the Board. (§2306.004)

(29) Determination Notice--A notice issued by the Department to the Development Owner of a Tax-Exempt Bond Development which states that the Development may be eligible to claim Housing Tax Credits without receiving an allocation of Housing Tax Credits from the State Housing Credit Ceiling because it satisfies the requirements of this QAP; sets forth conditions which must be met by the Development before the Department will issue the IRS Form(s) 8609 to the Development Owner; and specifies the Department's determination as to the amount of tax credits necessary for the financial feasibility of the Development and its viability as a rent restricted Development throughout the affordability period. (§42(m)(1)(D))

(30) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services (which fee cannot exceed the limits identified in §50.9(d)(6)(B) of this chapter) and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(31) Development--A proposed qualified and/or approved low-income housing project, as defined by the Code, §42(g), for New Construction, Reconstruction, or Rehabilitation, that consists of one or more buildings containing multiple Units, and that, if the Development shall consist of multiple buildings, is financed under a common plan and is owned by the same Person for federal tax purposes, and the buildings of which are either:

(A) Located on a single site or contiguous site; or

(B) Located on scattered sites and contain only rent-restricted units. (§2306.6702)

(32) Development Consultant--Any Person (with or without ownership interest in the Development) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(33) Development Funding--(2306.004):

(A) a loan or grant; or

(B) an in-kind contribution, including a donation of real property, a fee waiver for a building permit or for water or sewer service, or a similar contribution that:

(i) provides an economic benefit; and

(ii) results in a quantifiable cost reduction for the applicable Development.

(34) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract approved by the Department. (§2306.6702)

(35) Development Site--The area, or if scattered site areas, for which the Development is proposed to be located and is to be under control pursuant to §50.9(h)(7)(A) of this chapter.

(36) Development Team--All Persons or Affiliates thereof that play a role in the Development, construction, Rehabilitation, management and/or continuing operation of the subject Property, which will include any Development Consultant and Guarantor.

(37) Disaster Area--An area that has experienced a disaster and has been declared as a federal or state disaster, or has been identified by the Governor as requiring disaster assistance.

(38) Economically Distressed Area--Consistent with §17.921 of Texas Water Code, an Area in which:

(A) Water supply or sewer services are inadequate to meet minimal needs of residential users as defined by Texas Water Development Board rules;

(B) Financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and

(C) An established residential subdivision was located on June 1, 1989, as determined by the Texas Water Development Board.

(39) Eligible Basis--With respect to a building within a Development, the building's Eligible Basis as defined in the Code, §42(d).

(40) Executive Award and Review Advisory Committee ("The Committee")--A Departmental committee that will develop funding priorities and make funding and allocation recommendations to the Board based upon the evaluation of an Application in accordance with the housing priorities as set forth in Chapter 2306 of the Texas Government Code, and as set forth herein, and the ability of an Applicant to meet those priorities. (§2306.1112)

(41) Existing Residential Development--Any Development Site which contains 4 or more existing residential Units at the time the Volume I is submitted to the Department.

(42) Extended Housing Commitment--An agreement between the Department, the Development Owner and all successors in interest to the Development Owner concerning the extended housing use of buildings within the Development throughout the extended use period as provided in the Code, §42(h)(6). The Extended Housing Commitment with respect to a Development is expressed in the LURA applicable to the Development.

(43) General Contractor--One who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. This party may also be referred to as the "contractor."

(44) General Partner--That partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(45) Governmental Entity--Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts and other similar entities.

(46) Governmental Instrumentality--A legal entity such as a housing authority of a city or county, a housing finance corporation, or a municipal utility, which is created by a local political subdivision under statutory authority and which instrumentality is authorized to transact business for the political subdivision.

(47) Grant--Financial assistance that is awarded in the form of money to a housing sponsor or Development for a specific purpose and that is not required to be repaid. A Grant includes a forgivable loan. (2306.004)

(48) Guarantor--Any Person that provides, or is anticipated to provide, a guaranty for the equity or debt financing for the Development.

(49) Historically Underutilized Businesses (HUB)--Any entity defined as a historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(50) Housing Credit Agency--A Governmental Entity charged with the responsibility of allocating Housing Tax Credits pursuant to the Code, §42. For the purposes of this chapter, the Department is the sole "Housing Credit Agency" of the State of Texas.

(51) Housing Credit Allocation--An allocation by the Department to a Development Owner for a specific Application of Housing Tax Credits in accordance with the provisions of this chapter.

(52) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, that amount the Department determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the affordability period and which it allocates to the Development.

(53) Housing Tax Credit ("tax credits")--A tax credit allocated, or for which a Development may qualify, under the Housing Tax Credit Program, pursuant to the Code, §42. (§2306.6702)

(54) HUD--The United States Department of Housing and Urban Development, or its successor.

(55) Ineligible Building Types--Those Developments which are ineligible, pursuant to this QAP, for funding under the Housing Tax Credit Program, as follows:

(A) Hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the homeless and single room occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for Housing Tax Credits if the Development involves the conversion of the building to a non-transient multifamily residential Development. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living.

(B) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments of two stories or more that does not include elevator service for any Units or living space above the first floor.

(C) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments with any Units having more than two bedrooms.

(D) Any Development with building(s) with four or more stories that does not include an elevator.

(E) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments proposing more than 70% two-bedroom units.

(F) Any Development that violates the Integrated Housing Rule of the Department, §1.15 of this title.

(G) Any Development located in an Urban Area involving any New Construction (excluding New Construction of non-residential buildings) of additional Units (other than a Qualified Elderly Development, a Development composed entirely of single family dwellings, and certain specific types of transitional housing for the homeless and single room occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) in which any of the designs in clauses (i) - (iv) of this subparagraph are proposed. For Applications involving a combination of single family detached dwellings and multifamily dwellings, the percentages in this subparagraph do not apply to the single family detached dwellings. For Intergenerational Housing Applications, the percentages in this subparagraph do not apply to buildings that are restricted by the age requirements of a Qualified Elderly Development. An Application may reflect a total of Units for a given bedroom size greater than the percentages stated in clauses (i) - (v) of this subparagraph to the extent that the increase is only to reach the next highest number divisible by four.

(i) More than 30% of the total Units are one bedroom Units; or

(ii) More than 55% of the total Units are two bedroom Units; or

(iii) More than 40% of the total Units are three bedroom Units; or

(iv) More than 5% of the total Units in the Development with four or more bedrooms.

(H) Any Development that includes age restricted units that are not consistent with the Intergenerational Housing definition and policy or the definition of a Qualified Elderly Development.

(I) Any Development that contains residential units either designated for a single occupational group, or through a preference for a single occupational group, violates the general public use requirement.

(56) Intergenerational Housing--Housing that includes specific units that are restricted to the age requirements of a Qualified Elderly Development and specific units that are not age restricted in the same Development that:

(A) Have separate and specific buildings exclusively for the age restricted units,

(B) Have separate and specific leasing offices and leasing personnel exclusively for the age restricted units,

(C) Have separate and specific entrances, and other appropriate security measures for the age restricted units,

(D) Provide shared social service programs that encourage intergenerational activities but also provide separate amenities for each age group,

(E) Share the same Development site,

(F) Are developed and financed under a common plan and owned by the same Person for federal tax purposes; and

(G) Meet the requirements of the federal Fair Housing Act.

(57) IRS--The Internal Revenue Service, or its successor.

(58) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest, that encumbers the Development with respect to the requirements of this chapter, Chapter 2306, Texas Government Code, and the requirements of the Code, §42. (§2306.6702)

(59) Local Political Subdivision--A county or municipality (city) in Texas. For purposes of §50.9(i)(5) of this chapter, a local political subdivision may act through a Government Instrumentality such as a housing authority, housing finance corporation, or municipal utility even if the Government Instrumentality's creating statute states that the entity is not itself a "political subdivision."

(60) Material Noncompliance--As defined in Chapter 60, Subchapter A of this title.

(61) Minority Owned Business--A business entity at least 51% of which is owned by members of a minority group or, in the case of a corporation, at least 51% of the shares of which are owned by members of a minority group, and that is managed and Controlled by members of a minority group in its daily operations. Minority group includes women, African Americans, American Indians, Asian Americans, and Mexican Americans and other Americans of Hispanic origin. (§2306.6734)

(62) Neighborhood Organization--An organization that is composed of persons living near one another within the organization's defined boundaries for the neighborhood and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood. A neighborhood organization includes a homeowners' association or a property owners' association.

(63) New Construction--Any construction to a Development or a portion of the Development that does not meet the definition of Rehabilitation (which includes Reconstruction).

(64) ORCA--Office of Rural Community Affairs, as established by Chapter 487 of Texas Government Code.

(65) Person--Without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(66) Persons with Disabilities--A person who:

(A) Has a physical, mental or emotional impairment that:

(i) Is expected to be of a long, continued and indefinite duration,

(ii) Substantially impedes his or her ability to live independently, and

(iii) Is of such a nature that the disability could be improved by more suitable housing conditions,

(B) Has a developmental disability, as defined in the Developmental Disabilities Assistance and Bill of Rights Act (§42 U.S.C. §15002), or

(C) Has a disability, as defined in 24 CFR §5.403.

(67) Persons with Special Needs--Persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations and migrant farm workers.

(68) Pre-Application--A preliminary application, in a form prescribed by the Department, filed with the Department by an Applicant prior to submission of the Application, including any required exhibits or other supporting material, as more fully described in this chapter. (§2306.6704)

(69) Pre-Application Acceptance Period--That period of time during which Competitive Housing Tax Credit Pre-Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department.

(70) Principal--the term Principal is defined as Persons that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) Partnerships, Principals include all General Partners, Special Limited Partners and Principals with ownership interest;

(B) Corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a ten percent or more interest in the corporation; and

(C) Limited liability companies, Principals include all managing members, members having a ten percent or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(71) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(72) Qualified Allocation Plan (QAP)--

(A) As defined in the Code, §42(m)(1)(B): Any plan which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions; which also gives preference in allocating housing credit dollar amounts among selected projects to projects serving the lowest-income tenants, projects obligated to serve qualified tenants for the longest periods, and projects which are located in qualified census tracts and the development of which contributes to a concerted community revitalization plan; and which provides a procedure that the agency (or an agent or other private contractor of such agency) will follow in monitoring for noncompliance with the provisions of the Code, §42 and in notifying the Internal Revenue Service of such noncompliance which such agency becomes aware of and in monitoring for noncompliance with habitability standards through regular site visits.

(B) As defined in §2306.6702, Texas Government Code: A plan adopted by the board that provides the threshold, scoring, and underwriting criteria based on housing priorities of the Department that are appropriate to local conditions; provides a procedure for the Department, the Department's agent, or another private contractor of the Department to use in monitoring compliance with the qualified allocation plan and this subchapter; and consistent with §2306.6710(e), gives preference in housing tax credit allocations to Developments that, as compared to the other Developments:

(i) When practicable and feasible based on documented, committed, and available third-party funding sources, serve the lowest-income tenants per housing tax credit; and

(ii) Produce for the longest economically feasible period the greatest number of high quality units committed to remaining affordable to any tenants who are income-eligible under the low-income housing tax credit program.

(73) Qualified Basis--With respect to a building within a Development, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(74) Qualified Census Tract--Any census tract which is so designated by the Secretary of HUD in accordance with the Code, §42(d)(5)(C)(ii).

(75) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act and:

(A) Is intended for, and solely occupied by, individuals 62 years of age or older; or

(B) Is intended and operated for occupancy by at least one individual 55 years of age or older per Unit, where at least 80% of the total housing Units are occupied by at least one individual who is 55 years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for individuals 55 years of age or older. (See §42 U.S.C. §3607(b)).

(76) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(77) Qualified Nonprofit Organization--An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low-income housing within the meaning of the Code, §42(h)(5)(C). A Qualified Nonprofit Organization may select to compete in one or more of the Set-Asides, including, but not limited to, the nonprofit Set-Aside, the At-Risk Development Set-Aside and the TRDO-USDA Allocation. (§2306.6729)

(78) Qualified Nonprofit Development--A Development in which a Qualified Nonprofit Organization (directly or through a partnership or wholly-owned subsidiary) holds a controlling interest, materially participates (within the meaning of the Code, §469(h), as it may be amended from time to time) in its development and operation throughout the Compliance Period, and otherwise meets the requirements of the Code, §42(h)(5). (§2306.6729)

(79) Reference Manual--That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Housing Tax Credit Program.

(80) Rehabilitation--The improvement or modification of an Existing Residential Development through an alteration, incidental addition or enhancement. The term includes the demolition of an Existing Residential Development and the Reconstruction of any development units, but does not include the improvement or modification of an Existing Residential Development for the purposes of an adaptive reuse of the Development. Rehabilitation includes repairs necessary to correct the results of deferred maintenance, the replacement of principal fixtures and components, improvements to increase the efficient use of energy, and installation of security devices. Reconstruction, for these purposes, includes the demolition of one or more residential buildings in an Existing Residential Development and the re-construction of the Units on the Development Site. Developments proposing adaptive re-use or proposing to increase the total number of Units in the Existing Residential Development are not considered Reconstruction.

(81) Related Party--As defined, (§2306.6702)

(A) The following individuals or entities:

(i) The brothers, sisters, spouse, ancestors, and descendants of a person within the third degree of consanguinity, as determined by Chapter 573, Texas Government Code;

(ii) A person and a corporation, if the person owns more than 50% of the outstanding stock of the corporation;

(iii) Two or more corporations that are connected through stock ownership with a common parent possessing more than 50% of:

(I) The total combined voting power of all classes of stock of each of the corporations that can vote;

(II) The total value of shares of all classes of stock of each of the corporations; or

(III) The total value of shares of all classes of stock of at least one of the corporations, excluding, in computing that voting power or value, stock owned directly by the other corporation;

(iv) A grantor and fiduciary of any trust;

(v) A fiduciary of one trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(vi) A fiduciary of a trust and a beneficiary of the trust;

(vii) A fiduciary of a trust and a corporation if more than 50% of the outstanding stock of the corporation is owned by or for:

(I) The trust; or

(II) A person who is a grantor of the trust.

(viii) A person or organization and an organization that is tax-exempt under the Code, §501(a), and that is controlled by that person or the person's family members or by that organization;

(ix) A corporation and a partnership or joint venture if the same persons own more than:

(I) 50% of the outstanding stock of the corporation; and

(II) 50% of the capital interest or the profits' interest in the partnership or joint venture;

(x) An S corporation and another S corporation if the same persons own more than 50% of the outstanding stock of each corporation;

(xi) An S corporation and a C corporation if the same persons own more than 50% of the outstanding stock of each corporation;

(xii) A partnership and a person or organization owning more than 50% of the capital interest or the profits' interest in that partnership; or

(xiii) Two partnerships, if the same person or organization owns more than 50% of the capital interests or profits' interests.

(B) Nothing in this definition is intended to constitute the Department's determination as to what relationship might cause entities to be considered "related" for various purposes under the Code.

(82) Rules--The Department's Housing Tax Credit Program Qualified Allocation Plan and Rules as presented in this chapter.

(83) Rural Area--An area that is located:

(A) Outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) Within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an urban area; or

(C) In an Area that is eligible for funding by Texas Rural Development Office or the United States Department of Agriculture (TRDO-USDA), other than an area that is located in a municipality with a population of more than 50,000. (§2306.004)

(84) Rural Development--A Development or proposed Development that is located in a Rural Area, other than rural new construction Developments with more than 80 units.

(85) Selection Criteria--Criteria used to determine housing priorities of the State under the Housing Tax Credit Program as specifically defined in §50.9(i) of this chapter.

(86) Set-Aside--A reservation of a portion of the available Housing Tax Credits under the State Housing Credit Ceiling to provide financial support for specific types of housing or geographic locations or serve specific types of Applications or Applicants as permitted by the Qualified Allocation Plan on a priority basis. (§2306.6702)

(87) State Housing Credit Ceiling--The limitation on the aggregate amount of Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3)(C).

(88) Student Eligibility--Per the Code, §42(i)(3)(D), A unit shall not fail to be treated as a low-income unit merely because it is occupied:

(A) By an individual who is:

(i) A student and receiving assistance under Title IV of the Social Security Act (§42 U.S.C. §§601 et seq.), or

(ii) Enrolled in a job training program receiving assistance under the Job Training Partnership Act (29 USCS §§1501 et seq., generally; for full classification, consult USCS Tables volumes) or under other similar Federal, State, or local laws, or

(B) Entirely by full-time students if such students are:

(i) Single parents and their children and such parents and children are not dependents (as defined in the Code, §152) of another individual, or

(ii) Married and file a joint return.

(89) Tax-Exempt Bond Development--A Development requesting or having been awarded housing tax credits and which receives a portion of its financing from the proceeds of tax-exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4), such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(90) Third Party--A Third Party is a Person who is not an:

(A) Applicant, General Partner, Developer, or General Contractor, or

(B) An Affiliate or a Related Party to the Applicant, General Partner, Developer or General Contractor, or

(C) Person(s) receiving any portion of the contractor fee or developer fee.

(91) Threshold Criteria--Criteria used to determine whether the Development satisfies the minimum level of acceptability for consideration as specifically defined in §50.9(h) of this chapter. (§2306.6702)

(92) Total Housing Development Cost--The total of all costs incurred or to be incurred by the Development Owner in acquiring, constructing, rehabilitating and financing a Development, as determined by the Department based on the information contained in the Application. Such costs include reserves and any expenses attributable to commercial areas. Costs associated with the sale or use of Housing Tax Credits to raise equity capital shall also be included in the Total Housing Development Cost. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, and the environmental site assessment.

(93) TRDO-USDA--Texas Rural Development Office (TRDO) of the United States Department of Agriculture (USDA) serving the State of Texas (also known as USDA Rural Development and formerly known as TxFmHA) or its successor.

(94) Unit--Any residential rental unit consisting of an accommodation including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking (such as a microwave), and sanitation. (§2306.6702) For purposes of completing the Rent Schedule for loft or studio type Units (which still must meet the definition of Bedroom), a Unit with 649 square feet or less is considered an efficiency Unit, a Unit with 650 to 899 square feet is considered not more than a one-bedroom Unit, a Unit with 900 to 999 square feet is considered not more than a two-bedroom Unit, a Unit with 1000 to 1199 square feet is considered not more than a three-bedroom Unit, and a Unit with 1200 square feet or more is considered a four bedroom Unit.

(95) Urban Area--The Area that is located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area other than an Area described in paragraph (83)(B) or eligible for funding as described in paragraph (83)(C) of this subsection.

§50.4. State Housing Credit Ceiling.

The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C), using such information and guidance as may be made available by the Internal Revenue Service. The Department shall publish each such determination in the Texas Register within 30 days after the receipt of such infor-

mation as is required for that purpose by the Internal Revenue Service. The aggregate amount of commitments of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42. As permitted by the Code, §42(h)(4), Housing Credit Allocations made to Tax-Exempt Bond Developments are not included in the State Housing Credit Ceiling.

§50.5. Ineligibility; Disqualification and Debarment; Certain Applicant and Development Standards; Representation by Former Board Member or Other Person; Due Diligence, Sworn Affidavit; Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment.

(a) Ineligibility. An Application is ineligible if:

(1) The Applicant, Development Owner, Developer or Guarantor has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or (§2306.6721(c)(2))

(2) The Applicant, Development Owner, Developer or Guarantor has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen years preceding the Application deadline; or

(3) The Applicant, Development Owner, Developer or Guarantor at the time of Application is: subject to an enforcement or disciplinary action under state or federal securities law or by the NASD; is subject to a federal tax lien; or is the subject of an enforcement proceeding with any Governmental Entity; or

(4) The Applicant, Development Owner, Developer or Guarantor with any past due audits has not submitted those past due audits to the Department in a satisfactory format. A Person is not eligible to receive a commitment of Housing Tax Credits from the Department if any audit finding or questioned or disallowed cost is unresolved as of June 1 of each year, or for Tax-Exempt Bond Developments or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than 30 days after Volume III of the application is submitted; or

(5) (§2306.6703(a)(1)) At the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been:

(A) A member of the Board; or

(B) The Executive Director, a Deputy Executive Director, the Director of Multifamily Finance Production, the Director of Portfolio Management and Compliance, the Director of Real Estate Analysis, or a manager over housing tax credits employed by the Department.

(6) (§2306.6703(a)(2)) The Applicant proposes to replace in less than 15 years any private activity bond financing of the Development described by the Application, unless:

(A) The Applicant proposes to maintain for a period of 30 years or more 100% of the Development Units supported by Housing Tax Credits as rent-restricted and exclusively for occupancy by individuals and families earning not more than 50% of the Area Median Gross Income, adjusted for family size; and

(B) At least one-third of all the units in the Development are public housing units or Section 8 Development-based units; or,

(7) The Development is located in a municipality or in a valid Extra Territorial Jurisdiction (ETJ) of a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins (or for Tax-Exempt Bond Developments at the time the reservation is made by the Texas Bond Review Board) unless the Applicant: (§2306.6703(a)(4))

(A) Has obtained prior approval of the Development from the governing body of the appropriate municipality or county containing the Development; and

(B) Has included in the Application a written statement of support from that governing body. This statement must reference this rule and authorize an allocation of housing tax credits for the Development;

(C) For purposes of this paragraph, evidence under subparagraphs (A) and (B) of this paragraph must be received by the Department no later than April 1, 2008 (or for Tax-Exempt Bond Developments no later than 14 days before the Board meeting where the credits will be considered) and may not be more than one year old from the date the Volume 1 is submitted to the Department; or

(8) The Applicant proposes to construct a new development proposing New Construction (excluding New Construction of non-residential buildings) that is located one linear mile (measured by a straight line on a map) or less from a Development that: (§2306.6703(a)(3))

(A) Serves the same type of household as the new development, regardless of whether the development serves families, elderly individuals, or another type of household (Intergenerational Housing is not a type of household as it relates to this restriction);

(B) Has received an allocation of Housing Tax Credits (including Tax-Exempt Bond Developments) for any New Construction at any time during the three-year period preceding the date the application round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Volume I is submitted); and

(C) Has not been withdrawn or terminated from the Housing Tax Credit Program.

(D) An Application is not ineligible under this paragraph if:

(i) The Development is using federal HOPE VI funds received through the United States Department of Housing and Urban Development; locally approved funds received from a public improvement district or a tax increment financing district; funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (§42 U.S.C. §§12701 et seq.); or funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (§42 U.S.C. §§5301 et seq.); or

(ii) The Development is located in a county with a population of less than one million; or

(iii) The Development is located outside of a metropolitan statistical area; or

(iv) The local government where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under subparagraphs (A) - (C) of this paragraph. For

purposes of this clause, evidence of the local government vote or evidence required by subparagraph (D) of this paragraph must be received by the Department no later than April 1, 2008 (or for Tax-Exempt Bond Developments no later than 14 days before the Board meeting where the credits will be committed) and may not be more than one year old.

(E) In determining the age of an existing Development as it relates to the application of the three-year period, the Development will be considered from the date the Board took action on approving the allocation of tax credits. In dealing with ties between two or more Developments as it relates to this rule, refer to §50.9(j) of this chapter.

(9) A submitted Application has an entire Volume of the application missing; has excessive omissions of documentation from the Threshold Criteria or Uniform Application documentation; or is so unclear, disjointed or incomplete that a thorough review can not reasonably be performed by the Department, as determined by the Department. If an Application is determined ineligible pursuant to this section, the Application will be terminated without being processed as an Administrative Deficiency. To the extent that a review was able to be performed, specific reasons for the Department's determination of ineligibly will be included in the Termination letter to the Applicant.

(b) Disqualification and Debarment. The Department will disqualify an Application, and/or debar a Person, if it is determined by the Department that any issues identified in the paragraphs of this subsection exist. The Department may debar a Person for one year from the date of debarment, or until the violation causing the debarment has been remedied, whichever term is longer, if the Department determines the facts warrant it. Causes for disqualification and debarment include: (§2306.6721)

(1) The provision of fraudulent information, knowingly falsified documentation, or other intentional or negligent material misrepresentation in the Application or other information submitted to the Department at any stage of the evaluation or approval process; or

(2) The Applicant, Development Owner, Developer or Guarantor or anyone that has Controlling ownership interest in the Development Owner, Developer or Guarantor that is active in the ownership or Control of one or more other rent restricted rental housing properties in the state of Texas administered by the Department is in Material Noncompliance with the LURA (or any other document containing an Extended Housing Commitment) or the program rules in effect for such property as further described in Chapter 60 of this title on May 1, 2008 for Competitive Housing Tax Credit Applications or for Tax-Exempt Bond Development Applications or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than 30 days after Volume III of the application is submitted; (§2306.6721(c)(3)) or

(3) The Applicant, Development Owner, Developer, or any Guarantor, or any Affiliate of such entity has been a Principal of any entity that failed to make all loan payments to the Department in accordance with the terms of the loan, as amended, or was otherwise in default with any provisions of any loans from the Department; or

(4) The Applicant or the Development Owner that is active in the ownership or Control of one or more tax credit properties in the state of Texas has failed to pay in full any fees or penalties within 30 days of when they were billed by the Department, as further described in §50.20 of this chapter; or

(5) An Applicant or a Related Party and any Person who is active in the construction, Rehabilitation, ownership, or Control of the proposed Development, including a General Partner or contractor, and a Principal or Affiliate of a General Partner or contractor, or an individual employed as a consultant, lobbyist or attorney by an Applicant or a Related Party, communicates with any Board member during the period of time beginning on the date Applications are filed in an Application Round and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, unless the communication takes place at any board meeting or public hearing held with respect to that Application but not during a recess or other non-record portion of the meeting or hearing. Communication with Department staff must be in accordance with §50.9(b) of this chapter; violation of the communication restrictions of §50.9(b) is also a basis for disqualification and/or debarment. (§2306.1113)

(6) It is determined by the Department's General Counsel that there is evidence that establishes probable cause to believe that an Applicant, Development Owner, Developer, or any of their employees or agents has violated a state revolving door or other standard of conduct or conflict of interest statute, including §2306.6733, Texas Government Code, or a section of Chapter 572, Texas Government Code, in making, advancing, or supporting the Application.

(7) Applicants may be ineligible as further described in §50.5 of this chapter.

(8) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose previous funding contracts or commitments have been partially or fully deobligated due to a failure to meet contractual obligations during the 12 months prior to the submission of the applications.

(9) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose pre-development award from the Department has not been repaid for the Development at the time of Carryover Allocation or Bond closing.

(c) Certain Applicant and Development Standards. Notwithstanding any other provision of this section, the Department may not allocate tax credits to a Development proposed by an Applicant if the Department determines that: (§2306.223)

(1) The Development is not necessary to provide needed decent, safe, and sanitary housing at rental prices that individuals or families of low and very low-income or families of moderate income can afford;

(2) The Development Owner undertaking the proposed Development will not supply well-planned and well-designed housing for individuals or families of low and very low-income or families of moderate income;

(3) The Development Owner is not financially responsible;

(4) The Development Owner has contracted, or will contract for the proposed Development with, a Developer that:

(A) Is on the Department's debarred list, including any parts of that list that are derived from the debarred list of the United States Department of Housing and Urban Development;

(B) Has breached a contract with a public agency and failed to cure that breach; or

(C) Misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency and the amount of financial assistance awarded to the Developer by the agency;

(5) The financing of the housing Development is not a public purpose and will not provide a public benefit; and/or

(6) The Development will be undertaken outside the authority granted by this chapter to the Department and the Development Owner.

(d) Representation by Former Board Member or Other Person. (§2306.6733)

(1) A former Board member or a former executive director, deputy executive director, director of multifamily finance production, director of portfolio management and compliance, director of real estate analysis or manager over housing tax credits previously employed by the Department may not:

(A) For compensation, represent an Applicant or one of its Related Parties for an allocation of tax credits before the second anniversary of the date that the Board member's, director's, or manager's service in office or employment with the Department ceased;

(B) Represent any Applicant or a Related Party of an Applicant or receive compensation for services rendered on behalf of any Applicant or Related Party regarding the consideration of an Application in which the former board member, director, or manager participated during the period of service in office or employment with the Department, either through personal involvement or because the matter was within the scope of the board member's, director's, or manager's official responsibility; or for compensation, communicate directly with a member of the legislative branch to influence legislation on behalf of an Applicant or Related Party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the Department ceased.

(2) A Person commits a criminal offense if the Person violates §2306.6733. An offense under this section is a Class A misdemeanor.

(e) Due Diligence, Sworn Affidavit. In exercising due diligence in considering information of possible ineligibility, possible grounds for disqualification and debarment, Applicant and Development standards, possible improper representation or compensation, or similar matters, the Department may request a sworn affidavit or affidavits from the Applicant, Development Owner, Developer, Guarantor, or other persons addressing the matter. If an affidavit determined to be sufficient by the Department is not received by the Department within seven business days of the date of the request by the Department, the Department may terminate the Application.

(f) Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment. An Applicant or Person found ineligible, disqualified, debarred or otherwise terminated under subsections (a) - (e) of this section will be notified in accordance with the Administrative Deficiency process described in §50.9(d)(4) of this chapter. They may also utilize the appeals process described in §50.17(b) of this chapter. (§2306.6721(d))

§50.6. Site and Development Restrictions: Floodplain; Ineligible Building Types; Scattered Site Limitations; Credit Amount; Limitations on the Size of Developments; Limitations on Rehabilitation Costs; Unacceptable Sites; Appeals and Administrative Deficiencies for Site and Development Restrictions.

(a) Floodplain. Any Development proposing New Construction or Reconstruction and located within the 100 year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site so that all finished ground floor elevations are at least one foot above the flood plain and parking and drive areas are no lower than six inches below the floodplain, subject to more stringent local requirements. If no FEMA Flood Insurance Rate Maps are available for the proposed Development, flood zone documentation must be provided from the local government with jurisdiction identifying the 100 year floodplain. No buildings or roads that are part of a Development proposing Rehabilitation, with the exception of Developments with federal funding assistance from HUD or TX USDA-RHS, will be permitted in the 100 year floodplain unless they already meet the requirements established in this subsection for New Construction.

(b) Ineligible Building Types. Applications involving Ineligible Building Types as defined in §50.3(55) of this chapter will not be considered for allocation of tax credits.

(c) Scattered Site Limitations. Consistent with §50.3(31) of this chapter, a Development must be financed under a common plan, be owned by the same Person for federal tax purposes, and the buildings may be either located on a single site or contiguous site, or be located on scattered sites and contain only rent-restricted units. Tax-Exempt Bond Developments are permitted to be located on multiple sites consistent with Chapter 1372, Texas Government Code and as further clarified by the Texas Bond Review Board.

(d) Credit Amount. The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Development throughout the affordability period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Development by the Department, or that the Development will qualify for and be able to claim Housing Tax Credits. The Department will limit the allocation of tax credits to no more than $1.2 million per Development, adjusted annually for CPI (consumer price index) and published once each year in the Application Reference Manual prior to the Application Round. The Department shall not allocate more than $2 million of tax credits in any given Application Round to any Applicant, Developer, Related Party or Guarantor; Competitive Housing Tax Credits approved by the Board during the 2008 calendar year, including commitments from the 2008 Credit Ceiling and forward commitments from the 2009 Credit Ceiling, are applied to the credit cap limitation for the 2008 Application Round. In order to evaluate this $2 million limitation, Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must provide the documentation required in the Application with regard to this requirement. In order to encourage the capacity enhancement of inexperienced developers, the Department will prorate the credit amount allocated in situations where an Application is submitted in the either the Rural Regional Allocation or the Urban Regional Allocation. The Department will prorate the credits based on the percentage ownership, if there is an ownership interest, or the proportional percentage of the developer fee received, if this applies to a Developer without an ownership interest. To be considered for this provision, a copy of a Joint Venture Agreement and narrative on how this builds the capacity of the inexperienced developers is required. Tax-Exempt Bond Development Applications are not subject to these Housing Tax Credit limitations, and Tax-Exempt Bond Development Applications will not count towards the total limit on tax credits per Applicant. The limitation does not apply (§2306.6711(b)):

(1) To an entity which raises or provides equity for one or more Developments, solely with respect to its actions in raising or providing equity for such Developments (including syndication related activities as agent on behalf of investors);

(2) To the provision by an entity of "qualified commercial financing" within the meaning of the Code (without regard to the 80% limitation thereof);

(3) To a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Development by

such organization consists only of the provision of loan funds, grants or social services; and

(4) To a Development Consultant with respect to the provision of consulting services, provided the Development Consultant fee received for such services does not exceed 10% of the fee to be paid to the Developer, or $150,000, whichever is greater.

(e) Limitations on the Size of Developments.

(1) The minimum Development size will be 16 Units if the Development involves Housing Tax Credits. The minimum Development size will be 4 Units if the funding source only involves the Housing Trust Fund or HOME Program.

(2) Rural Developments involving any New Construction (excluding New Construction of non-residential buildings) will be limited to 80 Units (this includes individual Tax-Exempt Bond Developments). Rural Developments involving only Rehabilitation (excluding Reconstruction) do not have a size limitation.

(3) Urban Developments involving any New Construction (excluding New Construction of non-residential buildings), will be limited to 252 Total Units, wherein the maximum Department administered Units will be limited to 200 Units. Tax-Exempt Bond Developments will be limited to 252 Total Units. These maximum Unit limitations also apply to those Developments which involve a combination of Rehabilitation, Reconstruction, and New Construction. Only Developments that consist solely of acquisition/Rehabilitation or Rehabilitation may exceed the maximum Unit restrictions.

(4) For those Developments which are a second phase or are otherwise adjacent to an existing tax credit Development unless such proposed Development is being constructed to provide replacement of previously existing affordable multifamily units on its site (in a number not to exceed the original units being replaced, unless a market study supports the absorption of additional units) or that were originally located within a one mile radius from the proposed Development, the combined Unit total for the Developments may not exceed the maximum allowable Development size, unless the first phase has been completed and has attained Sustaining Occupancy (as defined in §1.31 of this title) for at least six months or a resolution is submitted with the Application from the local political authority stating there is an additional need and the market study supports the additional units.

(f) Limitations on the Location of Developments. Staff will only recommend, and the Board may only allocate, housing tax credits from the Credit Ceiling to more than one Development from the Credit Ceiling in the same calendar year if the Developments are, or will be, located more than one linear mile apart as determined by the Department. If the Board forward commits credits from the following year's allocation of credits, the Development is considered to be in the calendar year in which the Board votes, not in the year of the Credit Ceiling. This limitation applies only to communities contained within counties with populations exceeding one million (which for calendar year 2008 are Harris, Dallas, Tarrant and Bexar Counties). For purposes of this rule, any two sites not more than one linear mile apart are deemed to be "in a single community." (§2306.6711(f)) This restriction does not apply to the allocation of housing tax credits to Developments financed through the Tax-Exempt Bond program, including the Tax-Exempt Bond Development Applications under review and existing Tax-Exempt Bond Developments in the Department's portfolio. (§2306.67021)

(g) Limitations of Development in Certain Census Tracts. Staff will not recommend and the Board will not allocate housing tax credits for a Competitive Housing Tax Credit or Tax Exempt Bond Development located in a census tract that has more than 30% Housing Tax Credit Units per total households in the census tract as established by the U.S. Census Bureau for the most recent Decennial Census unless the Applicant:

(1) In an area whose population is less than 100,000;

(2) Proposes only Reconstruction or Rehabilitation (excluding New Construction of non-residential buildings); or,

(3) Submits to the Department an approval of the Development referencing this rule in the form of a resolution from the governing body of the appropriate municipality or county containing the Development. For purposes of this paragraph, evidence of the local government approval must be received by the Department no later than April 1, 2008 for Competitive Housing Tax Credit Applications (or for Tax-Exempt Bond Development Applications no later than 14 days before the Board meeting where the credits will be committed). These ineligible census tracts are outlined in the 2008 Housing Tax Credit Site Demographic Characteristics Report.

(h) Limitations on Developments Proposing to Qualify for a 30% increase in Eligible Basis. Staff will only recommend a 30% increase in Eligible Basis:

(1) If the Development proposing to build in a Hurricane Rita Gulf Opportunity Zone (Rita GO Zone), which was designated as a Difficult to Develop Area as determined by H.B. 4440, is able to be placed in service by December 31, 2010 (or date as revised by the Internal Revenue Service) as certified in the Application; or,

(2) The Development is located in a Qualified Census Tract that has less than 40% Housing Tax Credit Units per households in the tract as established by the U.S. Census Bureau for the most recent Decennial Census. Developments located in a Qualified Census Tract that has in excess of 40% Housing Tax Credit Units per households in the tract are not eligible to qualify for a 30% increase in Eligible Basis, which would otherwise be available for the Development site pursuant to the Code, §42(d)(5)(C), unless the Development is proposing only Reconstruction or Rehabilitation (excluding New Construction of non-residential buildings. These ineligible Qualified Census Tracts are outlined in the 2008 Housing Tax Credit Site Demographic Characteristics Report.

(i) Rehabilitation Costs. Developments involving Rehabilitation must establish that the Rehabilitation will substantially improve the condition of the housing and will involve at least $12,000 per Unit in direct hard costs (including site work, contingency, contractor profit, overhead and general requirements) unless financed with TRDO-USDA in which case the minimum is $6,000.

(j) Unacceptable Sites. Developments will be ineligible if the Development is located on a site that is determined to be unacceptable by the Department.

(k) Appeals and Administrative Deficiencies for Site and Development Restrictions. An Application or Development found to be in violation under subsections (a) - (k) of this section will be notified in accordance with the Administrative Deficiency process described in §50.9(d)(4) of this chapter. They may also utilize the appeals process described in §50.17(b) of this chapter.

§50.7. Regional Allocation Formula; Set-Asides; Redistribution of Credits.

(a) Regional Allocation Formula. §2306.1115 as required by §2306.111(d), Texas Government Code, the Department uses a regional distribution formula developed by the Department and commented on by the public to distribute credits from the State Housing Credit Ceiling to all urban areas and rural areas. This formula establishes separate targeted tax credit amounts for rural areas and urban areas within each

of the Uniform State Service Regions. Each Uniform State Service Region's targeted tax credit amount will be published on the Department's web site. The regional allocation for rural areas is referred to as the Rural Regional Allocation and the regional allocation for urban areas is referred to as the Urban Regional Allocation. Developments qualifying for the Rural Regional Allocation must meet the Rural Development definition. The Regional Allocation target will reflect that at least 20% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments in Rural Areas with a minimum of $500,000 for each uniform state service region. (§2306.111(d)(3))

(b) Set-Asides. An Applicant may elect to compete in as many of the following Set-Asides for which the proposed Development qualifies: (§2306.111(d))

(1) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of the Code, §42(h)(5). Qualified Nonprofit Organizations must have the Controlling interest in the Qualified Nonprofit Development applying for this Set-Aside. If the organization's Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the controlling managing General Partner. If the organization's Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member. Additionally, a Qualified Nonprofit Development submitting an Application in the nonprofit set-aside must have the nonprofit entity or its nonprofit affiliate or subsidiary be the Developer or a co-Developer as evidenced in the development agreement. (§2306.6729 and §2306.6706(b))

(2) At least 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments which are financed through TRDO-USDA, that meet the definition of a Rural Development, do not exceed 80 Units if proposing any New Construction (excluding New Construction of non-residential buildings), and have filed an "Intent to Request 2008 Housing Tax Credits" form by the Pre-Application submission deadline. (§2306.111(d)(2)) If an Application in this Set-Aside involves Rehabilitation it will be attributed to, and come from the, At-Risk Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region. Developments financed through TRDO-USDA's 538 Guaranteed Rural Rental Housing Program will not be considered under this set-aside. Any Rehabilitation or Reconstruction of an existing 515 development that retains the 515 loan and restrictions, regardless of the source or nature of additional financing, will be considered under the At-Risk and USDA set-aside. Commitments of 2008 Competitive Housing Tax Credits issued by the Board in 2008 will be applied to each Set-Aside, Rural Regional Allocation, Urban Regional Allocation and/or TRDO-USDA Allocation for the 2008 Application Round as appropriate.

(3) At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-Aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional formula required under subsection (a) of this section. Through this Set-Aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments designated as At-Risk Developments as defined in §50.3(13) of this chapter. (§2306.6714). To qualify as an At-Risk Development, the Applicant must provide evidence that it either is not eligible to renew, retain or preserve any portion of the financial benefit described in §50.3(13)(A) of this chapter, or provide evidence that it will renew, retain or preserve the financial benefit described in §50.3(13)(A) of this chapter; and must have filed an "Intent to Request 2008 Housing Tax Credits" form by the Pre-Application submission deadline. Up to 5% of the State Credit Ceiling associated with this Set-Aside may be given priority to Rehabilitation Developments funded with TRDO.

(c) Redistribution of Credits. (§2306.111(d)) If any amount of housing tax credits remain after the initial commitment of housing tax credits among the Set-Asides, Rural Regional Allocation and Urban Regional Allocation, the Department may redistribute the credits amongst the different regions and Set-Asides depending on the quality of Applications submitted as evaluated under the factors described in §50.9(d) of this chapter, the need to most closely achieve regional allocation goals and then the level of demand exhibited in the Uniform State Service Regions during the Application Round, except that, if there are any tax credits set aside for Developments in a Rural Area in a specific uniform region that remain after the allocation under §50.9(d)(5)(C), those tax credits shall be made available in any other Rural Area in the state, first, and then to Developments in Urban areas of any uniform state service region. (§2306.111(d)(3)) As described in subsection (b)(1) and (2) of this section, no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Developments which are not Qualified Nonprofit Developments. If credits will be transferred from a Uniform State Service Region which does not have enough qualified Applications to meet its regional credit distribution amount, then those credits will be apportioned to the other Uniform State Service Regions.

§50.8. Pre-Applications for Competitive Housing Tax Credits: Submission; Communication with Departments Staff; Evaluation Process; Threshold Criteria and Review; Results (§2306.6704).

(a) Pre-Application Submission. Any Applicant requesting a Housing Credit Allocation may submit a Pre-Application to the Department during the Pre-Application Acceptance Period along with the required Pre-Application Fee as described in §50.20 of this chapter. Only one Pre-Application may be submitted by an Applicant for each site under the State Housing Credit Ceiling. The Pre-Application submission is a voluntary process. While the Pre-Application Acceptance Period is open, Applicants may withdraw their Pre-Application and subsequently file a new Pre-Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized though not required to request the Applicant to provide additional information it deems relevant to clarify information contained in the Pre-Application or to submit documentation for items it considers to be Administrative Deficiencies. The rejection of a Pre-Application shall not preclude an Applicant from submitting an Application with respect to a particular Development or site at the appropriate time.

(b) Communication with the Department. Applicants that submit a Pre-Application are restricted from communication with Department staff as provided in §50.9(b) of this chapter. (§2306.1113)

(c) Pre-Application Evaluation Process. Eligible Pre-Applications will be evaluated for Pre-Application Threshold Criteria. Applications that are associated with a TRDO-USDA Development are not exempt from Pre-Application and are eligible to compete for the Pre-Application points further outlined in §50.9(i)(14) of this chapter. Pre-Applications that are found to have Administrative Deficiencies will be handled in accordance with §50.9(d)(4) of this chapter. Department review at this stage is limited and not all issues of eligibility and threshold are reviewed at Pre-Application. Acceptance by staff of a Pre-Application does not ensure that an Applicant satisfies all Application eligibility, Threshold or documentation requirements. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or threshold deficiencies at the time of Pre-Application.

(d) Pre-Application Threshold Criteria and Review. Applicants submitting a Pre-Application will be required to submit information demonstrating their satisfaction of the Pre-Application Thresh-

old Criteria. The Pre-Applications not meeting the Pre-Application Threshold Criteria will be terminated and the Applicant will receive a written notice to the effect that the Pre-Application Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Pre-Application Threshold Criteria and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Pre-Application Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. The Pre-Application Threshold Criteria include:

(1) Submission of a "Pre-Application Submission Form" and "Certification of Pre-Application Itemized Self-Score". The applicant may not change the Self-Score unless requested by the Department in a Deficiency Notice;

(2) Evidence of property control through February 29, 2008 as evidenced by the documentation required under §50.9(h)(7)(A) of this chapter; and

(3) Evidence in the form of a certification that all of the notifications required under this paragraph have been made. Requests for Neighborhood Organizations under subparagraph (A) of this paragraph must be made by the deadlines described in that clause; notifications under subparagraph (C) of this paragraph must be made prior to the close of the Pre-Application Acceptance Period. (§2306.6704) Evidence of notification must meet the requirements identified in subparagraph (B) of this paragraph to all of the individuals and entities identified in subparagraph (B) of this paragraph. (§2306.6704)

(A) The Applicant must request Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site as follows:

(i) No later than December 7, 2007, the Applicant must e-mail, fax or mail with registered receipt a completed, "Neighborhood Organization Request" letter as provided in the Pre-Application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request neighborhood organizations from that source in the same format.

(ii) If no reply letter is received from the local elected officials by January 1, 2008, then the Applicant must certify to that fact in the "Pre-Application Notification Certification Form" provided in the Pre-Application.

(iii) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as outlined by the local elected officials, or that the Applicant has knowledge of as of Pre-Application Submission in the "Pre-Application Notification Certification Form" provided in the Pre-Application.

(B) Not later than the date the Pre-Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism in the format required in the "Pre-Application Notification Template" provided in the Pre-Application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials. Evidence of Notification is required in the form of a certification in the "Pre-Application Notification Certification Form" provided in the Pre-Application, although it is encouraged that Applicants retain proof of notifications in the event that the Department requires proof of Notification. Officials to be notified are those officials in office at the time the Pre-Application is submitted.

(i) Neighborhood Organizations on record with the city, state or county whose boundaries include the proposed Development Site as identified in subparagraph (A)(iii) of this paragraph;

(ii) Superintendent of the school district containing the Development;

(iii) Presiding officer of the board of trustees of the school district containing the Development;

(iv) Mayor of any municipality containing the Development;

(v) All elected members of the governing body of any municipality containing the Development;

(vi) Presiding officer of the governing body of the county containing the Development;

(vii) All elected members of the governing body of the county containing the Development;

(viii) State senator of the district containing the Development; and

(ix) State representative of the district containing the Development.

(C) Each such notice must include, at a minimum, all of the following:

(i) The Applicant's name, address, individual contact name and phone number;

(ii) The Development name, address, city and county;

(iii) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(iv) Statement of whether the Development proposes New Construction, Reconstruction, or Rehabilitation;

(v) The type of Development being proposed (single family homes, duplex, apartments, townhomes, highrise etc.) and population being served (family, Intergenerational Housing, or elderly);

(vi) The approximate total number of Units and approximate total number of low-income Units;

(vii) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the percentage of Units that are market rate;

(viii) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Pre-Application, which are subject to change as annual changes in the area median income occur; and

(ix) The expected completion date if credits are awarded.

(e) Pre-Application Results. Only Pre-Applications which have satisfied all of the Pre-Application Threshold Criteria require-

ments set forth in subsection (d) of this section and §50.9(i)(14) of this chapter, will be eligible for Pre-Application points. The order and scores of those Developments released on the Pre-Application Submission Log do not represent a commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the Pre-Application Submission Log. Inclusion of a Development on the Pre-Application Submission Log does not ensure that an Applicant will receive points for a Pre-Application.

§50.9. Application: Submission; Ex Parte Communications; Adherence to Obligations; Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling; Evaluation Process for Tax-Exempt Bond Development Applications; Evaluation Process for Rural Rescue Applications Under the 2009 Credit Ceiling; Experience Pre-Certification Procedures; Threshold Criteria; Selection Criteria; Tiebreaker Factors; Staff Recommendations.

(a) Application Submission. Any Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application, and the required Application fee as described in §50.20 of this chapter, to the Department during the Application Acceptance Period. Only complete Applications will be accepted. All required volumes must be appropriately bound as required by the Application Submission Procedures Manual and fully complete for submission and received by the Department not later than 5:00 p.m. on the date the Application is due. A searchable electronic copy of all required volumes and exhibits, unless otherwise indicated in the Application Submission Procedures Manual, must be submitted in the format of a single file presented in the order they appear in the hard copy of the complete Application on a CD-R clearly labeled with the report type, Development name, and Development location is required for submission and received by the Department not later than 5:00 p.m. on the date the Application is due. Only one Application may be submitted for a site in an Application Round. While the Application Acceptance Period is open, Applicants may withdraw their Application and subsequently file a new Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized, but not required, to request the Applicant to provide additional information it deems relevant to clarify information contained in the Application or to submit documentation for items it considers to be an Administrative Deficiency, including ineligibility criteria, site and development restrictions, and threshold and selection criteria documentation. (§2306.6708) An Applicant may not change or supplement any part of an Application in any manner after the filing deadline, and may not add any set-asides, increase their credit amount, or revise their unit mix (both income levels and bedroom mixes), except in response to a direct request from the Department to remedy an Administrative Deficiency as further described in §50.3(1) of this chapter or by amendment of an Application after a commitment or allocation of tax credits as further described in §50.17(d) of this chapter.

(b) Ex Parte Communications.

(1) During the period beginning on the date project applications are filed in an application cycle and ending on the date the board makes a final decision with respect to the approval of any application in that cycle, a member of the board may not communicate with the following persons:

(A) an Applicant or related party, as defined by state law, including board rules, and federal law; and

(B) any person who is:

(i) active in the construction, rehabilitation, ownership, or control of the proposed project, including:

(I) a general contractor; and

(II) a principal or affiliate of a general partner or contractor; or

(ii) employed as a consultant, lobbyist, or attorney by an Applicant or a related party.

(2) During the period beginning on the date project Applications are filed in an Application Cycle and ending on the date the Board makes a final decision with respect to the approval of any Application in the cycle, an employee of the Department may communicate about the Application with the following persons:

(A) the Applicant or a related party, as defined by state law, including board rules and federal law; and

(B) any person who is:

(i) active in the construction, rehabilitation, ownership, or control of the proposed project, including:

(I) a general partner or contractor; and

(II) a principal or affiliate of a general partner or contractor; or

(ii) employed as a consultant, lobbyist or attorney by the Applicant or a related party.

(3) A communication under paragraph (2) of this subsection may be oral or in any written form, including electronic communication through the Internet, and must satisfy the following conditions:

(A) the communication must be restricted to technical or administrative matters directly affecting the Application;

(B) the communication must occur or be received on the premises of the Department during established business hours; and

(C) a record of the communication must be maintained and included with the Application for purposes of Board review and must contain the following information:

(i) the date, time, and means of communication;

(ii) the names and position titles of the persons involved in the communication and, if applicable, the person's relationship to the Applicant;

(iii) the subject matter of the communication; and

(iv) a summary of any action taken as a result of the communication.

(4) Not withstanding paragraphs (1) or (2) of this subsection, a Board member or Department employee may communicate without restriction with a person listed in paragraphs (1) or (2) during any Board meeting or public hearing held with respect to the Application, but not during a recess or other non-record portion of the meeting or hearing.

(5) Paragraph (1) of this subsection does not prohibit the Board from participating in social events at which a person with whom communications are prohibited may or will be present, provided that all matters related to Applications to be considered by the Board will not be discussed.

(c) Adherence to Obligations. (§2306.6720, General Appropriation Act, Article VII, Rider 8(a)) All representations, undertakings and commitments made by an Applicant in the application process for a Development, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice, Determination Notice, or Carryover Allocation for such

Development, the violation of which shall be cause for cancellation of such Commitment Notice, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Development, shall be enforceable even if not reflected in the LURA. All such representations are enforceable by the Department and the tenants of the Development, including enforcement by administrative penalties for failure to perform, as stated in the representations and in accordance with the LURA. If a Development Owner does not produce the Development as represented in the Application; does not receive approval for an amendment to the Application by the Department prior to implementation of such amendment; or does not provide the necessary evidence for any points received by the required deadline:

(1) The Development Owner must provide a plan to the Department, for approval and subsequent implementation, that incorporates additional amenities to compensate for the non-conforming components; and

(2) The Board will opt either to terminate the Application and rescind the Commitment Notice, Determination Notice or Carryover Allocation Agreement as applicable or the Department must:

(A) Reduce the score for Applications for Competitive Housing Tax Credits that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development by up to ten points for the two Application Rounds concurrent to, or following, the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board.

(B) Prohibit eligibility to apply for housing tax credits for a Tax-Exempt Bond Development that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development for up to 24 months from the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board, less any time delay caused by the Department.

(C) In addition to, or in lieu of, the penalty in subparagraph A or B of this paragraph, the Board may assess a penalty fee of up to $1,000 per day for each violation.

(3) For amendments approved administratively by the Executive Director, the penalties in paragraph (2) of this subsection will not be imposed, except if the amendment has been implemented prior to the date of the notice granting the request.

(d) Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling. Applications submitted for competitive consideration under the State Housing Credit Ceiling will be reviewed according to the process outlined in this subsection. An Application, during any of these stages of review, may be determined to be ineligible as further described in §50.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Set-Aside and Selection Criteria Review. All Applications will first be reviewed as described in this paragraph. Applications will be confirmed for eligibility for Set-Asides. Then, each Application will be preliminarily scored according to the Selection Criteria listed in subsection (i) of this section. When a particular scoring criterion involves multiple points, the Department will award points to the proportionate degree, in its determination, to which a proposed Development complied with that criterion. As necessary to complete this process only, Administrative Deficiencies may be issued to the Applicant. This process will generate a preliminary Department score for every application.

(2) Application Review Assessment. Each Application will be assessed based on either the Applicant's self-score or the Department's preliminary score, region, and any Set-Asides that the Application indicates it is eligible for, consistent with paragraph (5) of this subsection. Those Applications that appear to be most competitive will be reviewed in detail for Eligibility and Threshold Criteria during the Application Round.

(3) Eligibility and Threshold Criteria Review. Applications that appear to be most competitive will be evaluated for eligibility under §50.5(a)(7) - (9), (b) - (f), and §50.6 of this chapter. The remaining portions of the Eligibility Review under §50.5 of this chapter will be performed in the Compliance Evaluation and Eligibility Review as described under paragraph (7) of this subsection. The most competitive Applications will also be evaluated against the Threshold Criteria under subsection (h) of this section. The same portions of the Threshold Criteria review may be performed in the Underwriting Evaluation and Criteria review for financial feasibility by the Department's Real Estate Analysis Division as described under paragraph (6) of this subsection. Applications not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in each event the Applicant will be given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria. To the extent that the review of Threshold Criteria documentation, or submission of Administrative Deficiency documentation, alters the score assigned to the Application, Applicants will be notified of their final score.

(4) Administrative Deficiencies. If an Application contains Administrative Deficiencies pursuant to §50.3(1) of this chapter which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Selection, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made several times. The Department staff will request clarification or correction in a deficiency notice in the form of an email, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. If Administrative Deficiencies are not clarified or corrected to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then for competitive Applications under the State Housing Credit Ceiling, five points shall be deducted from the Selection Criteria score for each additional day the deficiency remains unresolved. If deficiencies are not clarified or corrected by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. This Administrative Deficiency process applies to requests for information made by the Real Estate Analysis Division review.

(5) Subsequent Evaluation of Applications and Methodology for Award Recommendations to the Board. The Department will assign, as herein described, Developments for review for financial feasibility by the Department's Real Estate Analysis Division--in general these will be those applications identified as most competitive and that meet the requirements of Eligibility and Threshold. This prioritization order will also be used in making recommendations to the Board as follows:

(A) Assignments will be determined by separately selecting the Applications with the highest scores in the At-Risk Set-Aside Statewide until the minimum requirements stated in §50.7(b) of this chapter are attained.

(B) Assignments will then be determined by selecting the Applications with the highest scores in the TRDO-USDA Allocation until the minimum requirements stated in §50.7(b) of this chapter are attained. If an Application in this Set-Aside involves Rehabilitation it will be attributed to, and come from the, At-Risk Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region.

(C) Remaining funds within each Uniform State Service Region will then be selected based on the highest scoring Developments in each of the 26 sub-regions, regardless of Set-Aside, in accordance with the requirements under §50.7(a) of this chapter, without exceeding the credit amounts available for a Rural Regional Allocation and Urban Regional Allocation in each region. To the extent that Applications in the At-Risk and TRDO-USDA Set-Asides are not competitive enough within their respective Set-Asides, they will also be able to compete, with no Set-Aside preference, within their appropriate sub-region.

(D) If there are any tax credits set-aside for Developments in a Rural Area in a specific uniform region that remain after allocation under subparagraph (C) of this paragraph those tax credits shall then be made available in any other Rural Area in the state to the Application in the most underserved Rural sub-region as compared to the Rural sub-region target. (§2306.111(d)(3)) This will be referred to as the Rural collapse.

(E) If there are any tax credits remaining in any sub-region after the Rural collapse, in the Rural or Urban allocation, they then will be combined and made available to the Application in the most underserved sub-region as compared to the sub-region target. This will be referred to as the statewide collapse.

(F) Staff will ensure that at least 10% of the State Housing Credit Ceiling is allocated to qualified Nonprofits to satisfy the Nonprofit Set-Aside. If 10% is not met, then the Department will add the highest scoring Qualified Nonprofits statewide until the 10% Nonprofit Set-Aside is met. Staff will ensure that at least 20% of the State Housing Credit Ceiling is allocated to Rural Developments. If this 20% minimum is not met, then the Department will add the highest scoring Rural Development Application statewide until the 20% Rural Development Set-Aside is met. Selection for each of the Set-Asides will take precedence over selection for the Rural Regional Allocation and Urban Regional Allocation. Funds for the Rural Regional Allocation or Urban Regional Allocation within a region, for which there are no eligible feasible applications, will be redistributed as provided in §50.7(c) of this chapter, Redistribution of Credits. If the Department determines that an allocation recommendation would cause a violation of the $2 million limit described in §50.6(d) of this chapter, the Department will make its recommendation by selecting the Development(s) that most effectively satisfies(y) the Department's goals in meeting set-aside and regional allocation goals. Based on Application rankings, the Department shall continue to underwrite Applications until the Department has processed enough Applications satisfying the Department's underwriting criteria to enable the allocation of all available housing tax credits according to regional allocation goals and Set-Aside categories. To enable the Board to establish a Waiting List, the Department shall underwrite as many additional Applications as necessary to ensure that all available Competitive Housing Tax Credits are allocated within the period required by law. (§2306.6710(a) - (f); §2306.111)

(6) Underwriting Evaluation and Criteria. The Department shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of housing tax credits. In determining an appropriate level of housing tax credits, the Department shall, at a minimum, evaluate the cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous housing tax credit allocations for the county in which the Development is to be located; if certifications are unavailable for the county, then the metropolitan statistical area in which the Development is to be located; or if certifications are unavailable under the county or the metropolitan statistical area, then the Uniform State Service Region in which the Development is to be located. Underwriting of a Development will include a determination by the Department, pursuant to the Code, §42, that the amount of credits recommended for commitment to a Development is necessary for the financial feasibility of the Development and its long-term viability as a qualified rent restricted housing property. In making this determination, the Department will use the Underwriting Rules and Guidelines, §1.32 of this title. An Applicant may not change or supplement any part of an Application in any manner after the filing deadline, and may not add any set-asides, increase their credit amount, or revise their unit mix (both income levels and bedroom mixes), except in response to a direct request from the Real Estate Analysis Division to remedy an Administrative Deficiency as further described in §50.3(1) of this chapter or by amendment of an Application after a commitment or allocation of tax credits as further described in §50.17(d) of this chapter. To the extent that the review of Administrative Deficiency documentation during this review alters the score assigned to the Application, Applicants will be re-notified of their final score. Receipt of feasibility points under §50.9(i)(1) of this chapter does not ensure that an Application will be considered feasible during the feasibility evaluation by the Real Estate Analysis Division and conversely, a Development may be found feasible during the feasibility evaluation by the Real Estate Analysis Division even if it did not receive points under subsection (i)(1) of this section. (§2306.6710 and §2306.11)

(A) The Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(B) The Department will reduce the Applicant's estimate of Developer's and/or Contractor fees in instances where these exceed the fee limits determined by the Department. In the instance where the Contractor is an Affiliate of the Development Owner and both parties are claiming fees, Contractor's overhead, profit, and general requirements, the Department shall be authorized to reduce the total fees estimated to a level that it determines to be reasonable under the circumstances. Further, the Department shall deny or reduce the amount of Housing Tax Credits allocated with respect to any portion of costs which it deems excessive or unreasonable. Excessive or unreasonable costs may include developer fee attributable to Related Party acquisition costs. The Department also may require bids or Third Party estimates in support of the costs proposed by any Applicant. The Developer's fee limits will be calculated as follows:

(i) New construction pursuant to §42(b)(1)(A) U.S.C, the developer fee cannot exceed 15% of the project's Total Eligible Basis, less developer fees, or 20% of the project's Total Eligible Basis, less developer fees if the Development proposes 49 total Units or less; and

(ii) Acquisition/rehabilitation developments that are eligible for acquisition credits pursuant to §42(b)(1)(B) U.S.C, the acquisition portion of the developer fee cannot exceed 15% of the existing structures acquisition basis, less developer fee, or 20% of the project's Total Eligible Basis, less developer fees if the Development proposes 49 total Units or less, and will be limited to 4% credits. The rehabilitation portion of the developer fee cannot exceed 15% of the total rehabilitation basis, less developer fee, or 20% of the project's Total Eligible Basis, less developer fees if the Development proposes 49 total Units or less.

(7) Compliance Evaluation and Eligibility Review. After the Department has determined which Developments will be reviewed for financial feasibility, those same Developments will be reviewed for evaluation of the compliance status by the Department's Portfolio Management and Compliance Division, in accordance with Chapter 60 of this title, and will be evaluated in detail for eligibility under §50.5(a) and (f) of this chapter.

(8) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns. Such inspection will evaluate the site based upon the criteria set forth in the Site Evaluation form provided in the Application and the inspector shall provide a written report of such site evaluation. The evaluations shall be based on the condition of the surrounding neighborhood, including appropriate environmental and aesthetic conditions and proximity to retail, medical, recreational, and educational facilities, and employment centers. The site's appearance to prospective tenants and its accessibility via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites include, without limitation, those containing a non-mitigable environmental factor that may adversely affect the health and safety of the residents. For Developments applying under the TRDO-USDA Set-Aside, the Department may rely on the physical site inspection performed by TRDO-USDA.

(e) Evaluation Process for Tax-Exempt Bond Development Applications. Applications submitted for consideration as Tax-Exempt Bond Developments will be reviewed according to the process outlined in this subsection. An Application, during any of these stages of review, may be determined to be ineligible as further described in §50.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Eligibility and Threshold Criteria Review. All Tax-Exempt Bond Development Applications will first be reviewed as described in this paragraph. Tax-Exempt Bond Development Applications will be confirmed for eligibility under §50.5 and §50.6 of this chapter and Applications will be evaluated in detail against the Threshold Criteria. Tax-Exempt Bond Development Applications found to be ineligible and/or not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in each event the Applicant will be given an opportunity to correct such deficiencies. Applications not meeting the Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled.

(2) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made several times. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. All Administrative Deficiencies shall be clarified or corrected to the satisfaction of the Department within five business days. Failure to resolve all outstanding deficiencies by 5:00 p.m. on the fifth business day following the date of the deficiency notice will result in a penalty fee of $500 for each business day the deficiency remains unresolved. Applications with unresolved deficiencies after 5:00 p.m. on the tenth day following the date of the deficiency notice will be terminated. The Applicant will be responsible for the payment of fees accrued pursuant to this section regardless of any termination pursuant to §50.5(b)(4) of this chapter. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. The Application will not be presented to the Board for consideration until all outstanding fees have been paid. This Administrative Deficiency process applies equally to the Real Estate Analysis Division review and feasibility evaluation and the same penalty and termination will be assessed.

(3) Underwriting and Compliance Evaluation and Criteria. The Department will assign all eligible Tax-Exempt Bond Development Applications meeting the eligibility and threshold requirements for review for financial feasibility by the Department's Real Estate Analysis Division, or the Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation. The Department or external party shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of housing tax credits as further described in subsection (d)(6) of this section. Tax-Exempt Bond Development Applications will also be reviewed for evaluation of the compliance status by the Department's Portfolio Management and Compliance Division in accordance with Chapter 60, Subchapter A of this title.

(4) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns as further described in subsection (d)(8) of this section.

(f) Evaluation Process for Rural Rescue Applications Under the 2009 Credit Ceiling. Applications submitted for consideration as Rural Rescue Applications pursuant to §50.10(c) of this chapter under the 2009 Credit Ceiling will be reviewed according to the process outlined in this subsection. A Rural Rescue Application, during any of these stages of review, may be determined to be ineligible as further described in §50.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Procedures for Intake and Review.

(A) Applications for Rural Rescue deals may be submitted between March 2, 2008 and November 15, 2008 and must be submitted in accordance with §50.21 of this chapter. A complete Application must be submitted at least 40 days prior to the date of the Board meeting at which the Applicant would like the Board to act on

the proposed Development. Applications must include the full Application Fee as further described in §50.20(c) of this chapter. Applicants must submit documents in accordance with the procedures set out in the 2008 Application Submission Procedures Manual for Volumes I, II, III and IV. Volume IV, evidencing Selection Criteria, MUST be submitted.

(B) Applicants do not need to participate in the Pre-Application process outlined in §50.8 of this chapter, nor will they need to submit pre-certification documents identified in §50.9(g) of this chapter.

(C) Applications will be processed on a first-come, first-served basis. Applications unable to meet all deficiency and underwriting requirements within 30 days of the request by the Department, will remain under consideration, but will lose their submission status and the next application in line will be moved ahead in order to expedite those applications most able to proceed. Applications for Rural Rescue will be processed and evaluated as described in this paragraph. Applications will be reviewed to ensure that the Application is eligible as a rural "rescue" Development as described in paragraph (2) of this subsection.

(D) Prior to the Development being recommended to the Board, TRDO-USDA must provide the Department with a copy of the physical site inspection report performed by TRDO-USDA, as provided in §50.9(d)(8) of this chapter.

(2) Eligibility Review. All Rural Rescue Applications will first be reviewed as described in this paragraph and eligibility will be confirmed pursuant to §50.5 and §50.6 of this chapter and the criteria listed in subparagraphs (A) - (C) of this paragraph. Applications found to be ineligible will be notified.

(A) Applications must be funded through TRDO-USDA;

(B) Applications must able to provide evidence that the loan:

(i) has been foreclosed and is in the TRDO-USDA inventory; or

(ii) is being foreclosed; or

(iii) is being accelerated; or

(iv) is in imminent danger of foreclosure or acceleration; or

(v) is for an application in which two adjacent parcels are involved, of which at least one parcel qualifies under clauses (i) - (iv) of this subparagraph and for which the application is submitted under one ownership structure, one financing plan an for which there are no market rate units. and

(C) Applicants must be identified as in compliance with TRDO-USDA regulations.

(3) Threshold Review. Applications will be evaluated in detail against the Threshold Criteria. Applications found to be ineligible and/or not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in which event the Applicant is given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria.

(4) Selection Criteria Review. All Rural Rescue Applications will be evaluated against the Selection Criteria and a score will be assigned to the Application. The minimum score for Selection Criteria is not required to be achieved to be eligible.

(5) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies as further described in subsection (d)(4) of this section.

(6) Underwriting and Compliance Evaluation and Criteria. The Department will assign all eligible Rural Rescue Applications meeting the eligibility and threshold requirements for review for financial feasibility by the Department's Real Estate Analysis Division, or the Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation. The Department or external party shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of housing tax credits as further described in subsection (d)(6) of this section. Rural Rescue Development Applications will also be reviewed for evaluation of the previous participation by the Department's Portfolio Management and Compliance Division in accordance with Chapter 60 of this title.

(7) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns as further described in subsection (d)(8) of this section.

(8) Credit Ceiling and Applicability of this Chapter. All Rural Rescue Applicants will receive their credit allocation out of the 2009 Credit Ceiling and therefore, will be required to follow the rules and guidelines identified in the Qualified Allocation Plan and Rules (QAP). However, because the 2009 QAP will not be in effect during the time period that the Rural Rescue applications can be submitted, applications submitted and eligible under the Rural Rescue Set-Aside will be considered by the Board to have satisfied the requirements of the 2009 QAP and are waived from 2009 QAP requirements that are changes from the 2008 QAP, to the extent permitted by statute.

(9) Procedures for Recommendation to the Board. Consistent with subsection (k) of this section, staff will make its recommendation to the Committee. The Committee will make commitment recommendations to the Board. Staff will provide the Board with a written, documented recommendation which will address at a minimum the financial and programmatic viability of each Application and a breakdown of which Selection Criteria were met by the Applicant. The Board will make its decision based on §50.10(a) of this chapter. Any award made to a Rural Rescue Development will be credited against the USDA Set-Aside for the 2009 Application Round, as required under §50.9(d)(5).

(10) Limitation on Allocation. No more than $350,000 in credits will be forward committed from the 2009 credit ceiling. To the extent applications are received that exceed the maximum limitation, staff will prepare the award for Board consideration noting for the Board that the award would require a waiver of this limitation.

(g) Experience Pre-Certification Procedures. No later than 14 days prior to the close of the Application Acceptance Period for Competitive Housing Tax Credit Applications, an Applicant must submit the documents required in this subsection to obtain the required pre-certifi-

cation. For Applications submitted for Tax-Exempt Bond Applications or Applications not applying for Competitive Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) all of the documents in this section must be submitted with the Application. Upon receipt of the evidence required under this section, a certification from the Department will be provided to the Applicant for inclusion in their Application(s). Evidence must show that one of the Development Owner's General Partners, the Developer or their Principals have a record of successfully constructing or developing residential units (single family or multifamily) in the capacity of owner, General Partner or Developer. If a Public Housing Authority organized an entity for the purpose of developing residential units the Public Housing Authority shall be considered a principal for the purpose of this requirement. If the individual requesting the certification was not the Development Owner, General Partner or Developer, but was the individual within one of those entities doing the work associated with the development of the units (responsibility for work associated with the development of units includes, but is not limited to, application submission, third-party engagement, post award activities, construction, cost certification, etc.), the individual must show that the units were successfully developed as required in paragraphs (1) and (2) of this subsection, and also provide written confirmation from the entity involved stating that the individual was the person responsible for the development. If rehabilitation experience is being claimed to qualify for an Application involving new construction, then the rehabilitation must have been substantial and involved at least $12,000 of direct hard cost per unit.

(1) The term "successfully" is defined as acting in a capacity as the owner, General Partner, or Developer of:

(A) At least 100 residential units or, if less than 100 residential units, 80% of the total number of Units the Applicant is applying to build (e.g. you must have 40 units successfully built to apply for 50 Units); or

(B) At least 36 residential units if the Development is a Rural Development; or

(C) At least 25 residential units if the Development has 36 or fewer total Units.

(2) One or more of the following documents must be submitted: American Institute of Architects (AIA) Document A111 - Standard Form of Agreement Between Owner & Contractor, AIA Document G704 - Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other documentation satisfactory to the Department verifying that the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals have the required experience. If submitting the IRS Form 8609, only one form per Development is required. The evidence must clearly indicate:

(A) That the Development has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion);

(B) That the names on the forms and agreements tie back to the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals as listed in the Application; and

(C) The number of units completed or substantially completed.

(h) Threshold Criteria. The following Threshold Criteria listed in this subsection are mandatory requirements at the time of Application submission unless specifically indicated otherwise:

(1) Completion and submission of the Application, which includes the entire Uniform Application and any other supplemental forms which may be required by the Department. (§2306.1111)

(2) Completion and submission of the Site Packet as provided in the Application.

(3) Set-Aside Eligibility. Documentation must be provided that confirms eligibility for all Set-Asides under which the Application is seeking funding as required in the Application.

(4) Certifications. The "Certification Form" provided in the Application confirming the following items:

(A) A certification of the basic amenities selected for the Development. All Developments, must meet at least the minimum threshold of points. These points are not associated with the selection criteria points in subsection (i) of this section. The amenities selected must be made available for the benefit of all tenants. If fees in addition to rent are charged for amenities reserved for an individual tenant's use, then the amenity may not be included among those provided to satisfy this requirement. Developments must provide a minimum number of common amenities in relation to the Development size being proposed. The amenities selected must be selected from clause (ii) of this subparagraph and made available for the benefit of all tenants. Developments proposing Rehabilitation (excluding Reconstruction) or proposing Single Room Occupancy will receive 1.5 points for each point item. Applications for non-contiguous scattered site housing, including New Construction, Reconstruction, Rehabilitation, and single-family design, will have the threshold test applied based on the number of Units per individual site, and must submit a separate certification for each individual site under control by the Applicant. Any future changes in these amenities, or substitution of these amenities, must be approved by the Department in accordance with §50.17(d) of this chapter and may result in a decrease in awarded credits if the substitution or change includes a decrease in cost, or in the cancellation of a Commitment Notice or Carryover Allocation if all of the Common Amenities claimed are no longer met.

(i) Applications must meet a minimum threshold of points (based on the total number of Units in the Development) as follows:

(I) Total Units are less than 13, 0 points are required to meet Threshold for Single Room Occupancy and 1 point is required to meet threshold for all other Developments;

(II) Total Units are between 13 and 24, 1 point is required to meet Threshold;

(III) Total Units are between 25 and 40, 3 points are required to meet Threshold;

(IV) Total Units are between 41 and 76, 6 points are required to meet Threshold;

(V) Total Units are between 77 and 99, 9 points are required to meet Threshold;

(VI) Total Units are between 100 and 149, 12 points are required to meet Threshold;

(VII) Total Units are between 150 and 199, 15 points are required to meet Threshold;

(VIII) Total Units are 200 or more, 18 points are required to meet Threshold.

(ii) Amenities for selection include those items listed in subclauses (I) - (XXVI) of this clause. Both Developments designed for families and Qualified Elderly Developments can earn

points for providing each identified amenity unless the item is specifically restricted to one type of Development. All amenities must meet accessibility standards as further described in subparagraphs (D) and (F) of this paragraph. An Application can only count an amenity once, therefore combined functions (a library which is part of a community room) only count under one category. Spaces for activities must be sized appropriately to serve the anticipated population.

(I) Full perimeter fencing (2 points);

(II) Controlled gate access (1 point);

(III) Gazebo w/sitting area (1 point);

(IV) Accessible walking/jogging path separate from a sidewalk (1 point);

(V) Community laundry room with at least one front loading washer (1 point);

(VI) Barbecue grill and picnic table-at least one of each for every 50 Units (1 point);

(VII) Covered pavilion that includes barbecue grills and tables (2 points);

(VIII) Swimming pool (3 points);

(IX) Furnished fitness center equipped with at least five of the following fitness equipment options: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, sauna, stair climber, etc.) (2 points);

(X) Equipped and functioning business center or equipped computer learning center with 1 computer for every 30 Units proposed in the Application, 1 printer for every 3 computers (with minimum of one printer), and 1 fax machine (2 points);

(XI) Furnished Community room (1 point);

(XII) Library with an accessible sitting area (separate from the community room) (1 point);

(XIII) Enclosed sun porch or covered community porch/patio (2 points);

(XIV) Service coordinator office in addition to leasing offices (1 point);

(XV) Senior Activity Room (Arts and Crafts, etc.) (2 points);

(XVI) Health Screening Room (1 point);

(XVII) Secured Entry (elevator buildings only) (1 point);

(XVIII) Horseshoe pit, putting green or shuffleboard court (1 point);

(XIX) Community Dining Room w/full or warming kitchen (3 points);

(XX) One Children's Playscape Equipped for 5 to 12 year olds, or one Tot Lot (1 Point);

(XXI) Two Children's Playscapes Equipped for 5 to 12 year olds, two Tot Lots, or one of each (2 points);

(XXII) Sport Court (Tennis, Basketball or Volleyball) (2 points);

(XXIII) Furnished and staffed Children's Activity Center (3 points);

(XXIV) Community Theater Room equipped with a 52 inch or larger screen with surround sound equipment; DVD player; and theater seating (3 points);

(XXV) Green Building (for example, passive solar heating/cooling, water conserving fixtures, collected water (at least 50%) for irrigation purposes, sub-metered electric meters, exceed energy star standards, photovoltaic panels for electricity and design and wiring for the use of such panels, construction waste management, provide recycle service, water permeable walkways and parking areas, or other Department approved items). (3 points); or

(XXVI) Hot Tub/Jacuzzi Spa (1 point).

(B) A certification that the Development will have all of the following Amenities at no charge to the tenants. All New Construction or Reconstruction Units must provide the amenities in clauses (i) - (ix) of this subparagraph. Rehabilitation (excluding Reconstruction) and Adaptive Reuse must provide the amenities in clauses (ii) - (ix) of this subparagraph unless expressly identified as not required. (§2306.187)

(i) All New Construction Units must be wired with 6 pair CAT5e wiring or better to provide phone and data service to each unit and wired with COAX cable to provide TV and high speed internet data service to each unit;

(ii) Blinds or window coverings for all windows;

(iii) Energy-Star or equivalently rated Dishwasher and Disposal (not required for TRDO-USDA or SRO Developments);

(iv) Energy-Star or equivalently rated (not required for SRO Developments) Refrigerator;

(v) Energy-Star or equivalently rated Oven/Range (not required for SRO Developments);

(vi) Exhaust/vent fans in bathrooms;

(vii) Energy-Star or equivalently rated Ceiling fans in living areas and bedrooms;

(viii) Energy-Star or equivalently rated Lighting in all Units;

(ix) Emergency 911 telephone accessible and available to tenants 24 hours a day.

(C) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or if no local building codes are in place then to the most recent version of the International Building Code.

(D) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (§42 U.S.C. §§3601 et seq.), and the Fair Housing Amendments Act of 1988 (§42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (§42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (§42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, the Code Requirements for Housing Accessibility 2000 (or as amended from time to time) produced by the International Code Council and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(E) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Develop-

ment are Minority Owned Businesses, and that the Applicant will submit a report at least once in each 90-day period following the date of the Commitment Notice until the Cost Certification is submitted, in a format prescribed by the Department and provided at the time a Commitment Notice is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses. (§2306.6734)

(F) Pursuant to §2306.6722, any Development supported with a housing tax credit allocation shall comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C. The Applicant must provide a certification from the Development engineer, an accredited architect or Department-approved third party accessibility specialist, that the Development will comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C and this subparagraph. (§2306.6722 and §2306.6730)

(G) Developments involving New Construction (excluding New Construction of non-residential buildings) where some Units are two-stories or single family design and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type (i.e. one bedroom, two bedroom, three bedroom) must provide an accessible entry level and all common-use facilities in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. A similar certification will also be required after the Development is completed from an inspector, architect, or accessibility specialist.

(H) A certification that the Development will be equipped with energy saving devices that meet the standard statewide energy code adopted by the state energy conservation office, unless historic preservation codes permit otherwise for a Development involving historic preservation. All Units must be air-conditioned. The measures must be certified by the Development architect as being included in the design of each tax credit Unit at the time the 10% Test Documentation is submitted and in actual construction upon Cost Certification. (§2306.6725(b)(1))

(I) A certification that the Development will be built by a General Contractor that satisfies the requirements of the General Appropriation Act, Article VII, Rider 8(c) applicable to the Department which requires that the General Contractor hired by the Development Owner or the Applicant, if the Applicant serves as General Contractor, must demonstrate a history of constructing similar types of housing without the use of federal tax credits.

(J) A certification that the Development Owner agrees to establish a reserve account consistent with §2306.186 Texas Government Code and as further described in §1.37 of this title.

(K) A certification that the Applicant, Developer, or any employee or agent of the Applicant has not formed a neighborhood organization for purposes of subsection (i)(2) of this section, has not given money or a gift to cause the neighborhood organization to take its position of support or opposition, nor has provided any assistance to a neighborhood organization to meet the requirements under subsection (i)(2) of this section which are not allowed under that subsection, as it relates to the Applicant's Application or any other Application under consideration in 2008.

(L) Operate in accordance with the requirements pertaining to rental assistance in Chapter 60 of this title.

(M) A certification that the Development Owner will contract with a Management Company through out the Compliance Period that will perform criminal background checks on all adult tenants, head and co-head of households.

(5) Design Items. This exhibit will provide:

(A) All of the architectural drawings identified in clauses (i) - (iii) of this subparagraph. While full size design or construction documents are not required, the drawings must have an accurate and legible scale and show the dimensions. All Developments involving New Construction, or conversion of existing buildings not configured in the Unit pattern proposed in the Application, must provide all of the items identified in clauses (i) - (iii) of this subparagraph. For Developments involving Rehabilitation for which the Unit configurations are not being altered, only the items identified in clauses (i) and (iii) of this subparagraph are required:

(i) A site plan which:

(I) Is consistent with the number of Units and Unit mix specified in the "Rent Schedule" provided in the Application;

(II) Identifies all residential and common buildings and amenities; and

(III) Clearly delineates the flood plain boundary lines and all easements shown in the site survey;

(ii) Floor plans and elevations for each type of residential building and each common area building clearly depicting the height of each floor and a percentage estimate of the exterior composition. Adaptive reuse Developments, are only required to provide building plans delineating each unit by number, type and area consistent with those in the "Rent Schedule" and pictures of each elevation of the existing building depicting the height of each floor and percentage estimate of the exterior composition; and

(iii) Unit floor plans for each type of Unit showing special accessibility and energy features. The net rentable areas these Unit floor plans represent should be consistent with those shown in the "Rent Schedule" provided in the application. Adaptive reuse Developments, are only required to provide Unit floor plans for each distinct typical Unit type (i.e. one-bedroom, two-bedroom) and for all Units types that vary in area by 10% from the typical Unit; and

(B) A boundary survey of the proposed Development site and of the property to be purchased. In cases where more property is purchased than the proposed site of the Development, the survey or plat must show the survey calls for both the larger site and the subject site. The survey does not have to be recent; but it must show the property purchased and the property proposed for Development. In cases where the site of the Development is only a part of the site being purchased, the depiction or drawing of the Development portion may be professionally compiled and drawn by an architect, engineer or surveyor.

(6) Evidence of the Development's development costs and corresponding credit request and syndication information as described in subparagraphs (A) - (G) of this paragraph.

(A) A written narrative describing the financing plan for the Development, including any non-traditional financing arrangements; the use of funds with respect to the Development; the funding sources for the Development including construction, permanent and bridge loans, rents, operating subsidies, and replacement reserves; and the commitment status of the funding sources for the Development. This information must be consistent with the information provided throughout the Application. (§2306.6705(1))

(B) All Developments must submit the "Development Cost Schedule" provided in the Application. This exhibit must have

been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(C) Provide a letter of commitment from a syndicator that, at a minimum, provides an estimate of the amount of equity dollars expected to be raised for the Development in conjunction with the amount of housing tax credits requested for allocation to the Development Owner, including pay-in schedules, syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis. (§2306.6705(2) and (3))

(D) For Developments located in a Qualified Census Tract (QCT) as determined by the Secretary of HUD and qualifying for a 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C), if permitted under §50.6(h) of this chapter, Applicants must submit a copy of the census map clearly showing that the proposed Development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual.

(E) Rehabilitation Developments must submit a Property Condition Assessment meeting the requirements of paragraph (14)(C) of this subsection.

(F) If offsite costs are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the supplemental form "Off Site Cost Breakdown" must be provided.

(G) If projected site work costs include unusual or extraordinary items or exceed $9,000 per Unit, then the Applicant must provide a detailed cost breakdown prepared by a Third Party engineer or architect, and a letter from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis and which ones may be ineligible.

(7) Evidence of readiness to proceed as evidenced by at least one of the items under each of subparagraphs (A) - (D) of this paragraph:

(A) Evidence of Property control in the name of the Development Owner. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights to the Development Owner. All of the sellers of the proposed Property for the 36 months prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development team must be identified at the time of Application (not required at Pre-Application). One of the following items described in clauses (i) - (iii) of this subparagraph must be provided, and if the acquisition can be characterized as an identity of interest transaction as described in §1.32 of this title, items described in clause (iv) of this subparagraph must also be provided:

(i) A recorded warranty deed with corresponding executed settlement statement, unless required to submit items under clause (iv) of this subparagraph; or

(ii) A contract for lease (the minimum term of the lease must be at least 45 years) which is valid for the entire period the Development is under consideration for tax credits; or

(iii) A contract for sale, an exclusive option to purchase which is valid for the entire period the Development is under consideration for tax credits. For Tax Exempt Bond Development Applications, site control must be valid through December 1, 2007 with option to extend through March 1, 2008 (Applications submitted for lottery) or 90 days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting. The potential expiration of site control does not warrant the Application being presented to the TDHCA Board prior to the scheduled meeting.

(iv) If the acquisition can be characterized as an identity of interest transaction as described in §1.32 of this title, subclauses (I), (II) and (III) of this clause will be required (not required at Pre-Application):

(I) Documentation of the original acquisition cost in the form of a settlement statement or, if a settlement statement is not available, the seller's most recent audited financial statement indicating the asset value for the proposed Property, and

(II) If the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the application,

(-a-) An appraisal meeting the requirements of paragraph (14)(D) of this subsection, and

(-b-) Any other verifiable costs of owning, holding, or improving the Property that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include Property taxes, interest expense, a calculated return on equity at a rate consistent with the historical returns of similar risks, the cost of any physical improvements made to the Property, the cost of rezoning, replatting or developing the Property, or any costs to provide or improve access to the Property.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, a calculated return on equity at a rate consistent with the historical returns of similar risks, and allow the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure.

(III) In no instance will the acquisition cost utilized by the underwriter exceed the lesser of the original acquisition cost evidenced by subclause (I) of this clause plus costs identified in subclause (II)(-b-) of this clause, or the "as-is" value conclusion evidenced by subclause (II)(-a-) of this clause.

(v) As described in clauses (ii) and (iii) of this subparagraph, Property control must be continuous. Closing on the Property is acceptable, as long as evidence is provided that there was no period in which control was not retained.

(B) Evidence from the appropriate local municipal authority that satisfies one of clauses (i) - (iii) of this subparagraph. Documentation may be from more than one department of the municipal authority and must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period. (§2306.6705(5))

(i) For New Construction or Reconstruction Developments, a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that:

(I) The Development is located within the boundaries of a political subdivision which does not have a zoning ordinance; and either subclauses (II) or (III) of this clause;

(II) The letter must state that the Development is consistent with a local consolidated plan, comprehensive plan, or other local planning document that addresses affordable housing; or

(III) The letter must state that there is a need for affordable housing, if no such planning document exists.

(ii) For New Construction or Reconstruction Developments, a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction stating that:

(I) The Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development; or

(II) The Applicant is in the process of seeking the appropriate zoning and has signed and provided to the political subdivision a release agreeing to hold the political subdivision and all other parties harmless in the event that the appropriate zoning is denied, and a time schedule for completion of appropriate zoning. The Applicant must also provide at the time of Application a copy of the application for appropriate zoning filed with the local entity responsible for zoning approval and proof of delivery of that application in the form of a signed certified mail receipt, signed overnight mail receipt, or confirmation letter from said official. Final approval of appropriate zoning must be achieved and documentation of acceptable zoning for the Development, as proposed in the Application, must be provided to the Department at the time the Commitment Fee, or Determination Notice Fee, is paid. If this evidence is not provided with the Commitment Fee, any commitment of credits will be rescinded. No extensions may be requested for the deadline for submitting evidence of final approval of appropriate zoning.

(iii) For Rehabilitation Development, if the property is currently a non-conforming use as presently zoned, a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction which addresses the items in subclauses (I) - (IV) of this clause:

(I) A detailed narrative of the nature of non-conformance;

(II) The applicable destruction threshold;

(III) Owner's rights to reconstruct in the event of damage; and

(IV) Penalties for noncompliance.

(C) Evidence of interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Any local, state or federal financing identified in this section which restricts household incomes at any AMGI lower than restrictions required pursuant to the Rules must be identified in the Rent Schedule and the local, state or federal income restrictions must include corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g), Internal Revenue Code. The income and corresponding rent restrictions will be imposed by the housing tax credit LURA and monitored throughout the extended use period. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in clauses (i) - (iv) of this subparagraph:

(i) Bona fide financing in place as evidenced by:

(I) A valid and binding loan agreement;

(II) Deed(s) of trust in the name of the Development Owner expressly allowing transfer to the Development Owner; and

(III) For TRDO-USDA 515 Developments involving , an executed TRDO-USDA letter indicating TRDO-USDA has received a Consent Request, also referred to as a Preliminary Submittal, as described in 7 CFR §3560.406 and a copy of the original loan documents; or,

(ii) Bona fide commitment or term sheet for the interim and permanent loans issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the Development Owner and which has been executed by the lender (the term of the loan must be for a minimum of 15 years with at least a 30 year amortization). The commitment must state an expiration date and all the terms and conditions applicable to the financing including the mechanism for determining the interest rate, if applicable, and the anticipated interest rate and any required Guarantors. Such a commitment may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits; or,

(iii) Any Federal, State or local gap financing, whether of soft or hard debt, must be identified at the time of Application as evidenced by:

(I) Evidence from the lending agency that an application for funding has been made or from the Applicant indicating an intent to apply for funding; and

(II) A term sheet which clearly describes the amount and terms of the funding, and the date by which the funding determination will be made and any commitment issued, must be submitted; and

(III) Evidence of application for funding from another Department program is not required except as indicated on the Uniform Application, as long as the Department funding is on a concurrent funding period with the Application submitted and the Applicant clearly indicates that such an Application has been filed as required by the Application Submission Procedures Manual; and

(IV) If the commitment from any funding source identified in this subparagraph has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the funding source, the Commitment Notice may be rescinded; or

(iv) If the Development will be financed through more than 5% of Development Owner contributions, provide a letter from an Third Party CPA verifying the capacity of the Development Owner to provide the proposed financing with funds that are not otherwise committed together with a letter from the Development Owner's bank or banks confirming that sufficient funds are available to the Development Owner. Documentation must have been prepared and executed not more than 6 months prior to the close of the Application Acceptance Period.

(D) Provide the documents in clauses (i) - (iii) of this subparagraph:

(i) A copy of the full legal description

(ii) A current valuation report from the county tax appraisal district and documentation of the current total property tax rate for the proposed Property, and

(iii) A copy of:

(I) The current title policy which shows that the ownership (or leasehold) of the land/Development is vested in the exact name of the Development Owner; or

(II) a current title commitment with the proposed insured matching exactly the name of the Development Owner and the title of the Property/Development vested in the exact name of the seller or lessor as indicated on the sales contract or lease.

(III) If the title policy or commitment is more than six months old as of the day the Application Acceptance Period closes, then a letter from the title company indicating that nothing further has transpired on the policy or commitment.

(8) Evidence in the form of a certification of all of the notifications described in the subparagraphs of this paragraph. Such notices must be prepared in accordance with the "Public Notifications" certification provided in the Application.

(A) Evidence in the form of a certification that the Applicant met the requirements and deadlines identified in clauses (i) - (iii) of this subparagraph. Notification must not be older than three months from the first day of the Application Acceptance Period. (§2306.6705(9)) If evidence of these notifications was submitted with the Pre-Application Threshold for the same Application and satisfied the Department's review of Pre-Application Threshold, then no additional notification is required at Application, except that re-notification is required by tax credit Applicants who have submitted a change in the Application, whether from Pre-Application to Application or as a result of a deficiency that reflects a total Unit increase of greater than 10%, a total increase of greater than 10% for any given level of AMGI, or a change to the population being served (elderly, Intergenerational Housing or family). For Applications submitted for Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.), notifications and proof thereof must not be older than three months prior to the date the Volume III of the Application is submitted.

(i) The Applicant must request Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site from local elected officials as follows:

(I) No later than January 15, 2008 for Competitive Housing Tax Credit Applications (or for Tax-Exempt Bond Applications, Rural Rescue, or Applications not applying for Tax Credits, but applying only for other Multifamily Programs such as HOME, Housing Trust Fund, etc., not later than 21 days prior to submission of the Threshold documentation), the Applicant must e-mail, fax or mail with registered receipt a completed, "Neighborhood Organization Request" letter as provided in the Application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request neighborhood organizations from that source in the same format.

(II) If no reply letter is received from the local elected officials by February 21, 2008, (or For Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only for other Multifamily Programs such as HOME, Housing Trust Fund, etc., by 7 days prior to the submission of the Application), then the Applicant must certify to that fact in the "Application Notification Certification Form" provided in the Application.

(III) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as outlined by the local elected officials, or that the Applicant has knowledge of as of the submission of the Application, in the "Application Notification Certification Form" provided in the Application.

(ii) Not later than the date the Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism e-mail, fax or mail with registered receipt in the format required in the "Application Notification Template" provided in the Application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials. Evidence of Notification is required in the form of a certification in the "Application Notification Certification Form" provided in the Application, although it is encouraged that Applicants retain proof of notifications in the event that the Department requires proof of Notification. Officials to be notified are those officials in office at the time the Application is submitted.

(I) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site as identified in clause (i)(III) of this subparagraph.

(II) Superintendent of the school district containing the Development;

(III) Presiding officer of the board of trustees of the school district containing the Development;

(IV) Mayor of the governing body of any municipality containing the Development;

(V) All elected members of the governing body of any municipality containing the Development;

(VI) Presiding officer of the governing body of the county containing the Development;

(VII) All elected members of the governing body of the county containing the Development;

(VIII) State senator of the district containing the Development; and

(IX) State representative of the district containing the Development.

(iii) Each such notice must include, at a minimum, all of the following:

(I) The Applicant's name, address, individual contact name and phone number;

(II) The Development name, address, city and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Statement of whether the Development proposes New Construction, Reconstruction, or Rehabilitation;

(V) The type of Development being proposed (single family homes, duplex, apartments, townhomes, highrise etc.) and population being served (family, Intergenerational Housing or elderly);

(VI) The approximate total number of Units and approximate total number of low-income Units;

(VII) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the percentage of Units that are market rate;

(VIII) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Application, which are subject to change as annual changes in the area median income occur; and

(IX) The expected completion date if credits are awarded.

(B) Signage on Property or Alternative. A Public Notification Sign shall be installed on the Development Site prior to the date the Application is submitted unless prohibited by local ordinance or code. Scattered site Developments must install a sign on each Development Site. For Competitive Housing Tax Credit Applications the date, time and location of the public hearing, as published by the Department and closest to the Development site, must be included on the sign. For Tax-Exempt Bond Developments, regardless of the Priority of the Application or the Issuer, the sign must be installed within thirty (30) days of the Department's receipt of Volumes I and II. The date, time and location of the bond Tax Exempt Fiscal Responsibility Act (TEFRA) public hearing must be included on the sign no later than thirty (30) days prior to the scheduled public hearing. Evidence submitted with the Application must include photographs of the site with the installed sign. The sign must be at least 4 feet by 8 feet in size and located within twenty feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day that the Board takes final action on the Application for the Development. The information and lettering on the sign must meet the requirements identified in the Application. For Tax-Exempt Bond Developments, regardless of the issuer, the Applicant must certify to the fact that the sign was installed within 30 days of submission and the date, time and location of the bond hearing is indicated on the sign at least 30 days prior to the date of the scheduled hearing. In areas where the Public Notification Sign is prohibited by local ordinance or code, an alternative to installing a Public Notification Sign and at the same required time, the Applicant shall, mail written notification to those addresses described in either clause (i) or (ii) of this subparagraph. This written notification must include the information otherwise required for the sign as provided in the Application. The final Application must include a map of the proposed Development site and mark the distance required by clause (i) or (ii) of this subparagraph, up to 1,000 feet, showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. Evidence must be provided affirming the signage violation to the local code and the local zoning notification requirements.

(i) All addresses required for notification by local zoning notification requirements. For example, if the local zoning notification requirement is notification to all those addresses within 200 feet, then that would be the distance used for this purpose; or

(ii) For Developments located in communities that do not have zoning, communities that do not require a zoning notification, or those located outside of a municipality, all addresses located within 1,000 feet of any part of the proposed Development site.

(C) If any of the Units in the Development are occupied at the time of Application, then the Applicant must certify that they have notified each tenant at the Development and let the tenants know of the Department's public hearing schedule for comment on submitted Applications.

(9) Evidence of the Development's proposed ownership structure and the Applicant's previous experience as described in subparagraphs (A) - (D) of this paragraph.

(A) Chart which clearly illustrates the complete organizational structure of the final proposed Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable, whether directly or through one or more subsidiaries. Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must be included in this exhibit.

(B) Each Applicant, Development Owner, Developer or Guarantor, or any entity shown on an organizational chart as described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, shall provide the following documentation, as applicable:

(i) For entities that are not yet formed but are to be formed either in or outside of the state of Texas, a certificate of reservation of the entity name from the Texas Secretary of State; or

(ii) For existing entities whether formed in or outside of the state of Texas, evidence that the entity has the authority to do business in Texas or has applied for such authority.

(C) Evidence that each entity shown on the organizational chart described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, has provided a copy of the completed and executed Previous Participation and Background Certification Form to the Department. Nonprofit entities, public housing authorities and publicly traded corporations are required to submit documentation for the entities involved; documentation for individual board members and executive directors is required for this exhibit. Any Person receiving more than 10% of the Developer fee will also be required to submit documents for this exhibit. The 2008 versions of these forms, as required in the Uniform Application, must be submitted. Units of local government are also required to submit this document. The form must include a list of all developments that are, or were, previously under ownership or Control of the Person. All participation in any TDHCA funded or monitored activity, including non-housing activities, must be disclosed.

(D) Evidence, in the form of a certification, that one of the Development Owner's General Partners, the Developer or their Principals have a record of successfully constructing or developing residential units in the capacity of owner, General Partner or Developer. Evidence must be a certification from the Department that the Person with the experience satisfies this exhibit, as further described under subsection (g)(1) of this section. Applicants must request this certification at least fourteen days prior to the close of the Application Acceptance Period. Applicants must ensure that the Person whose name is on the certification appears in the organizational chart provided in subparagraph (A) of this paragraph.

(10) Evidence of the Development's projected income and operating expenses as described in subparagraphs (A) - (D) of this paragraph:

(A) All Developments must provide a 30-year proforma estimate of operating expenses and supporting documentation used to generate projections (operating statements from comparable properties).

(B) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds or proof of Application must be provided, which at a minimum identifies the source and annual amount of the funds, the number of Units receiving the funds, and the term and expiration date of the contract or other agreement. (§2306.6705(4))

(C) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate.

(D) Occupied Developments undergoing Rehabilitation must also submit the items described in clauses (i) - (iv) of this subparagraph.

(i) The items in subclauses (I) and (II) of this clause are required unless the current property owner is unwilling to provide the required documentation. In that case, submit a signed statement as to its inability to provide all documentation as described.

(I) Submit at least one of the following:

(-a-) Historical monthly operating statements of the subject Development for 12 consecutive months ending not more than 3 months from the first day of the Application Acceptance Period;

(-b-) The two most recent consecutive annual operating statement summaries;

(-c-) The most recent consecutive six months of operating statements and the most recent available annual operating summary;

(-d-) All monthly or annual operating summaries available and a written statement from the seller refusing to supply any other summaries or expressing the inability to supply any other summaries, and any other supporting documentation used to generate projections may be provided; and

(II) A rent roll not more than 6 months old as of the first day the Application Acceptance Period, that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, and dates of first occupancy and expiration of lease.

(ii) A written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iii) For Intergenerational Applications or Qualified Elderly Developments, identification of the number of existing tenants qualified under the target population elected under this chapter;

(iv) A relocation plan outlining relocation requirements and a budget with an identified funding source; and (§2306.6705(6))

(v) If applicable, evidence that the relocation plan has been submitted to the appropriate legal agency. (§2306.6705(6))

(11) Applications involving Nonprofit General Partners and Qualified Nonprofit Developments.

(A) All Applications involving a nonprofit General Partner, regardless of the Set-Aside applied under, in which the Development will receive some financial or tax benefit for the involvement of the nonprofit General Partner, must submit all of the documents described in clauses (i) and (ii) of this subparagraph and indicate the nonprofit status on the carryover documentation and IRS Forms 8609: (§2306.6706)

(i) An IRS determination letter which states that the nonprofit organization is a §501(c)(3) or (4) entity or ; and

(ii) The "Nonprofit Participation Exhibit."

(B) Additionally, all Applications applying under the Nonprofit Set-Aside, established under §50.7(b)(1) of this chapter, must also provide the following information with respect to the Qualified Nonprofit Organization as described in clauses (i) - (iii) of this subparagraph.

(i) A Third Party legal opinion stating:

(I) That the nonprofit organization is not affiliated with or Controlled by a for profit organization and the basis for that opinion, and

(II) That the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit SetAside and the basis for that opinion. Eligibility is contingent upon the non-profit organization Controlling the Development, or if the organization's Application is filed on behalf of a limited partnership, or limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member; and otherwise meet the requirements of the Code, §42(h)(5),

(III) That one of the exempt purposes of the nonprofit organization is to provide low-income housing, and

(IV) That the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board, and

(V) That the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement; and

(ii) A copy of the nonprofit organization's most recent audited financial statement; and

(iii) Evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) In this state, if the Development is located in a Rural Area; or

(II) Not more than 90 miles from the Development, if the Development is not located in a Rural Area.

(12) Applicants applying for acquisition credits must provide must provide

(A) An appraisal meeting the requirements of paragraph (14)(D) of this subsection, and

(B) An "Acquisition of Existing Buildings Form."

(13) Evidence of Financial Statement and Authorization to Release Credit Information. The financial statements and authorization to release credit information must be unbound and clearly labeled. A "Financial Statement and Authorization to Release Credit Information" must be completed and signed for any General Partner, Developer or Guarantor and any Person that has an ownership interest of ten percent or more in the Development Owner, General Partner, Developer, or Guarantor. Nonprofit entities, public housing authorities and publicly traded corporations are only required to submit documentation for the entities involved; documentation for individual board members and executive directors is not required for this exhibit.

(A) Financial statements for an individual must not be older than 90 days from the first day of the Application Acceptance Period.

(B) Financial statements for partnerships or corporations should be for the most recent fiscal year ended 90 days from the first day of the Application Acceptance Period. An audited financial statement should be provided, if available, and all partnership or corporate financials must be certified. Financial statements are required for an entity even if the entity is wholly-owned by a Person who has submitted this document as an individual.

(C) Entities that have not yet been formed and entities that have been formed recently but have no assets, liabilities, or net worth are not required to submit this documentation, but must submit a statement with their Application that this is the case.

(14) Supplemental Threshold Reports. All Applications must include documents under subparagraphs (A) and (B) of this paragraph. If required under paragraph (6) of this subsection, a Property Condition Assessment as described in subparagraph (C) of this paragraph must be submitted. If required under paragraph (7) or (12) of this subsection, an appraisal as described in subparagraph (D) of this paragraph must be submitted. All submissions must meet the requirements stated in subparagraphs (E) - (G) of this paragraph.

(A) A Phase I Environmental Site Assessment (ESA) report:

(i) Prepared by a qualified Third Party;

(ii) Dated not more than 12 months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Development is more than 12 months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated letter or updated report dated not more than three months prior to the first day of the Application Acceptance Period from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report; and

(iii) Prepared in accordance with the Department's Environmental Site Assessment Rules and Guidelines, §1.35 of this title.

(iv) Developments whose funds have been obligated by TRDO-USDA will not be required to supply this information; however, the Applicants of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) A comprehensive Market Analysis report:

(i) Prepared by a Third Party Qualified Market Analyst approved by the Department in accordance with the approval process outlined in the Market Analysis Rules and Guidelines, §1.33 of this title;

(ii) Dated not more than 6 months prior to the first day of the Application Acceptance Period. In the event that a Market Analysis is more than 6 months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated Market Analysis from the Person or organization which prepared the initial report; however the Department will not accept any Market Analysis which is more than 12 months old as of the first day of the Application Acceptance Period; and

(iii) Prepared in accordance with the methodology prescribed in the Department's Market Analysis Rules and Guidelines, §1.33 of this title.

(iv) For Applications in the TRDO-USDA Set-Aside proposing acquisition and Rehabilitation with residential structures at or above 80% occupancy at the time of Application Submission, the appraisal, required under paragraphs (7) or (12) of this subsection and prepared in accordance with the Uniform Standards of Professional Appraisal Practice and the Department's Appraisal Rules and Guidelines, §1.34 of this title, will satisfy the requirement for a Market Analysis; however the Department may request additional information as needed. (§2306.67055) (§42(m)(1)(A)(iii))

(C) A Property Condition Assessment (PCA) report:

(i) Prepared by a qualified Third Party;

(ii) Dated not more than 6 months prior to the first day of the Application Acceptance Period; and

(iii) Prepared in accordance with the Department's Property Condition and Assessment Rules and Guidelines, §1.36 of this title.

(iv) For Developments which require a capital needs assessment from TRDO-USDA, the capital needs assessment may be substituted and may be more than 6 months old, as long as TRDO-USDA has confirmed in writing that the existing capital needs assessment is still acceptable.

(D) An appraisal report:

(i) Prepared by a qualified Third Party;

(ii) Dated not more than 6 months prior to the first day of the Application Acceptance Period. In the event that an appraisal is more than 6 months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated appraisal from the Person or organization which prepared the initial report; however the Department will not accept any appraisal which is more than 12 months old as of the first day of the Application Acceptance Period; and

(iii) Prepared in accordance with the Uniform Standards of Professional Appraisal Practice and the Department's Appraisal Rules and Guidelines, §1.34 of this title.

(iv) For Developments that require an appraisal from TRDO-USDA, the appraisal may be more than 6 months old, as long as TRDO-USDA has confirmed in writing that the existing appraisal is still acceptable.

(E) Inserted at the front of each of these reports must be a transmittal letter from the individual preparing the report that states that the Department is granted full authority to rely on the findings and conclusions of the report. The transmittal letter must also state the report preparer has read and understood the Department rules specific to the report found at §§1.33 - 1.36 of this title.

(F) All Applicants acknowledge by virtue of filing an Application that the Department is not bound by any opinion expressed in the report. The Department may determine from time to time that information not required in the Department's Rules and Guidelines will be relevant to the Department's evaluation of the need for the Development and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the report provider or revisions to the report to meet this need. In instances of non-response by the report provider, the Department may substitute in-house analysis.

(G) The requirements for each of the reports identified in subparagraphs (A) - (C) of this paragraph can be satisfied in either of the methods identified in clause (i) or (ii) of this subparagraph and meet the requirements of clause (iii) of this subparagraph.

(i) Upon Application submission, the documentation for each of these exhibits may be submitted in its entirety; or

(ii) Upon Application submission, the Applicant may provide evidence in the form of an executed engagement letter with the party performing each of the individual reports that the required exhibit has been commissioned to be performed and that the delivery date will be no later than April 1, 2008. In addition to the submission of the engagement letter with the Application, a map must be provided that reflects the Qualified Market Analyst's intended market area. Subsequently, the entire exhibit must be submitted on or before 5:00 p.m. CST, April 1, 2008. If the entire exhibit is not received by that time, the Application will be terminated and will be removed from consideration.

(iii) A single hard copy of the report and a searchable soft copy in the format of a single file containing all information and exhibits in the hard copy report, presented in the order they appear in the hard copy report on a CD-R clearly labeled with the report type, Development name, and Development location are required.

(15) Self-Scoring. Applicant's self-score must be completed on the "Application Self-Scoring Form." An Applicant may not adjust the Application Self Scoring Form without a request from the Department as a result of an Administrative Deficiency.

(i) Selection Criteria. All Applications will be scored and ranked using the point system identified in this subsection. Unless otherwise stated, use normal rounding. Points other than paragraphs (2) and (6) of this subsection will not be awarded unless requested in the Self Scoring Form. All Applications, with the exception of TRDO-USDA Applications, must receive a final score totaling a minimum of 111, not including any points awarded or deducted pursuant to paragraphs (2) and (6) of this subsection to be eligible for an allocation of Housing Tax Credits. Maximum Total Points: 228.

(1) Financial Feasibility of the Development. Financial Feasibility of the Development based on the supporting financial data required in the Application that will include a Development underwriting pro forma from the permanent or construction lender. (§2306.6710(b)(1)(A)) Applications may qualify to receive 28 points for this item. No partial points will be awarded. Evidence will include the documentation required for this exhibit, as reflected in the Application submitted, in addition to the commitment letter required under subsection (h)(7)(C) of this section. The supporting financial data shall include:

(A) A fifteen year pro forma prepared by the permanent or construction lender:

(i) Specifically identifying each of the first five years and every fifth year thereafter;

(ii) Specifically identifying underlying assumptions including, but not limited to general growth factor applied to income and expense; and

(iii) Indicating that the Development maintains a minimum 1.15 debt coverage ratio throughout the initial fifteen years proposed for all third party lenders that require scheduled repayment; and

(B) A statement in the commitment letter, or other form deemed acceptable by the Department, indicating that the lender's assessment finds that the Development will be feasible for fifteen years.

(C) For Developments receiving financing from TRDO-USDA, the form entitled "Sources and Uses Comprehensive Evaluation for Multi-Family Housing Loans" or other form deemed acceptable by the Department shall meet the requirements of this section.

(2) Quantifiable Community Participation from Neighborhood Organizations on Record with the State or County and Whose Boundaries Contain the Proposed Development Site. Points will be awarded based on written statements of support or opposition from Neighborhood Organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site. (§2306.6710(b)(1)(B); §2306.6725(a)(2)). It is possible for points to be awarded or deducted based on written statements from organizations that were not identified by the process utilized for notification purposes under subsection (h)(8)(A)(ii) of this section if the organization provides the information and documentation required in subparagraphs (A) - (C) of this paragraph. It is also possible that neighborhood organizations that were initially identified as appropriate organizations for purposes of the notification requirements will subsequently be determined by the Department not to meet the requirements for scoring.

(A) Basic Submission Requirements for Scoring. Each Neighborhood Organization may submit one letter (and enclosures) that represents the organization's input. In order to receive a point score, the letter (and enclosures) must be received or postmarked (or similar tracking system) by the Department no later than February 29, 2008, for letters relating to Applications that submitted a Pre-Application, or April 1, 2008 if a Pre-Application was not submitted. Letters should be addressed to the Texas Department of Housing and Community Affairs, "Attention: Executive Director (Neighborhood Input)." Letters received after the applicable deadline will be summarized for the Board's information and consideration, but will not affect the score for the Application. The organization's letter (and enclosures) must:

(i) State the name and location of the proposed single Development;

(ii) Certify that the letter is signed by the person with the authority to sign on behalf of the neighborhood organization, and provide:

(I) the street and/or mailing addresses;

(II) day and evening phone numbers;

(III) and e-mail addresses and/or facsimile numbers for the signer of the letter; and

(IV) for one additional contact including their contact information for the organization;

(iii) Certify that the organization has boundaries, and that the boundaries in effect February 29, 2008 contain the proposed Development site;

(iv) Certify that the organization meets the definition of "Neighborhood Organization as defined in §50.3(62) of this chapter." For the purposes of this section, a "Neighborhood Organization" is defined as an organization of persons living near one another within the organization's defined boundaries in effect February 29, 2008 that contain the proposed Development site and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood. "Neighborhood organizations" include homeowners associations, property owners associations, and resident councils in which the council is commenting on the Rehabilitation or Reconstruction of the property occupied by the residents. "Neighborhood organizations" do not include broader based "community" organizations.

(v) Include documentation showing that the organization is on record as of February 29, 2008 with the state or county in which the Development is proposed to be located. The receipt of a QCP letter, by the Department on or before February 29, 2008, that meets the requirements outlined in the QCP neighborhood information packet and the 2008 QAP, will constitute being on record with the State. The neighborhood organization must include in their letter, a contact name with a mailing address and phone number; and a written description and map of the organization's geographical boundaries, as well as proof that the boundaries described were in effect as of February 29, 2008. This request must be received no later than February 29, 2008. Acceptance of this documentation will be subject to Department approval. The Department is permitted to issue a deficiency notice for this registration process and if satisfied, the organization will still be deemed to be timely placed on record with the state.

(vi) Accurately certify that the Neighborhood Organization was not formed by any Applicant, Developer, or any employee or agent of any Applicant (the seller of land is not considered, with the exception of an identity of interest, to be an agent of the Application) in the 2008 Competitive Housing Tax Credit Application Round, that the organization and any member did not accept money or a gift to cause the neighborhood organization to take its position of support or opposition, and has not provided any assistance other than education and information sharing to the neighborhood organization to meet the requirements of this subparagraph for any application in the Application Round (i.e. hosting a public meeting, providing the "TDHCA Information Packet for Neighborhoods" to the Neighborhood Organization, or referring the Neighborhood Organization to TDHCA staff for guidance). Applicants may not provide any "production" assistance to meet these requirements for any application in the Application Round (i.e. use of fax machines owned by the Applicant, use of legal counsel related to the Applicant, or assistance drafting a letter for the purposes of this subparagraph). Applicants may not request Neighborhood Organizations to change their boundaries to include the Development site.

(vii) While not required, the organization is encouraged to hold a meeting to which all the members of the organization are invited to consider whether the organization should support, oppose, or be neutral on the proposed Development, and to have the membership vote on whether the organization should support, oppose, or be neutral on the proposed Development. The organization is also encouraged to invite the developer to this meeting.

(viii) Letters from Neighborhood Organizations, and subsequent correspondence from Neighborhood Organizations, may not be provided via the Applicant which includes facsimile and email communication.

(B) Scoring of Letters (and Enclosures). The input must clearly and concisely state each reason for the Neighborhood Organization's support for or opposition to the proposed Development.

(i) The score awarded for each letter for this exhibit will range from a maximum of +24 for the position support to +12 for the neutral position to 0 for a position of opposition. The number of points to be allocated to each organization's letter will be based on the organization's letter and evidence enclosed with the letter. The final score will be determined by the Executive Director. The Department may investigate a matter and contact the Applicant and Neighborhood Organizations for more information. The Department may consider any relevant information specified in letters from other Neighborhood Organizations regarding a Development in determining a score.

(ii) The Department highly values quality public input addressed to the merits of a Development. Input that points out matters that are specific to the neighborhood, the proposed site, the proposed Development, or Developer are valued. If a proposed Development is permitted by the existing or pending zoning or absence of zoning, concerns addressed by the allowable land use that are related to any multifamily development may generally be considered to have been addressed at the local level through the land use planning process. Input concerning positive efforts or the lack of efforts by the Applicant to inform and communicate with the neighborhood about the proposed Development is highly valued. If the Neighborhood Organization refuses to communicate with the Applicant the efforts of the Applicant will not be considered negative. Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered.

(iii) In general, letters that meet the requirements of this paragraph and:

(I) Establish at least one reason for support or opposition will be scored the maximum points for either support (+24 points) or opposition (zero);

(II) That do not establish a reason for support or opposition or that are unclear will be considered ineligible and scored as neutral (+12 points).

(iv) Applications for which there are multiple eligible letters received, an average score will be applied to the Application.

(v) Applications for which no letters from neighborhood organizations are scored will receive a neutral score of +12 points.

(C) Basic Submission Deficiencies. The Department is authorized but not required to request that the Neighborhood Organization provide additional information or documentation the Department deems relevant to clarify information contained in the organization's letter (and enclosures). If the Department determines to request additional information from an organization, it will do so by e-mail or facsimile to the e-mail address or facsimile number provided with the organization's letter. If the deficiencies are not clarified or corrected in the Department's determination within seven business days from the date the e-mail or facsimile is sent to the organization, the organization's letter will not be considered further for scoring and the organization will be so advised. This potential deficiency process does not extend any deadline required above for the "Quantifiable Community Participation" process. An organization may not submit additional information or documentation after the applicable deadlines deadline except in response to an e-mail or facsimile from the Department specifically requesting additional information.

(3) The Income Levels of Tenants of the Development. Applications may qualify to receive up to 22 points for qualifying under only one of subparagraphs (A) - (F) of this paragraph. To qualify for these points, the household incomes must not be higher than permitted by the AMGI level The Development Owner, upon making selections for this exhibit, will set aside Units at the levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. These income levels require corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g), Internal Revenue Code. (§2306.6710(b)(1)(C); §2306.111(g)(3)(B); §2306.6710(e); §42(m)(1)(B)(ii)(I); §2306.111(g)(3)(E))

(A) 22 points if at least 80% of the Total Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(B) 22 points if at least 40% of the Total Units in the Development are set-aside with incomes at or below a combination of

50% and 30% of AMGI in which at least 5% of the Total Units are at or below 30% of AMGI; or

(C) 20 points if at least 60% of the Total Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(D) 18 points if at least 10% of the Total Units in the Development are set-aside with incomes at or below 30% of AMGI; or

(E) 16 points if at least 40% of the Total Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(F) 14 points if at least 35% of the Total Units in the Development are set-aside with incomes at or below 50% of AMGI.

(4) The Size and Quality of the Units (Development Characteristics). Applications may qualify to receive up to 20 points. Applications may qualify for points under both subparagraphs (A) and (B) of this paragraph. (§2306.6710(b)(1)(D); §42(m)(1)(C)(iii))

(A) Size of the Units. Applications may qualify to receive 6 points. The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Six points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), Developments receiving funding from TRDO-USDA, or Developments proposing single room occupancy without meeting these square footage minimums if requested in the Self Scoring Form. The square feet of all of the Units in the Development, for each type of Unit, must be at least the minimum noted in clauses (i) - (v) of this subparagraph. Changes to an Application during any phase of the review process that decreases the square footage below the minimums noted in clauses (i) - (v) of this subparagraph, will be re-evaluated and may result in a reduction of the Application score.

(i) 500 square feet for an efficiency Unit;

(ii) 650 square feet for a non-elderly one Bedroom Unit; 550 square feet for an elderly one Bedroom Unit;

(iii) 900 square feet for a non-elderly two Bedroom Unit; 750 square feet for an elderly two Bedroom Unit;

(iv) 1,000 square feet for a three Bedroom Unit; and

(v) 1,200 square feet for a four Bedroom Unit.

(B) Quality of the Units. Applications may qualify to receive up to 14 points. Applications in which Developments provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in clauses (i) - (xix) of this subparagraph, not to exceed 14 points in total. Applications involving scattered site Developments must have all of the Units located with a specific amenity to count for points. Applications involving Rehabilitation or single room occupancy may receive 1.5 points for each point item, not to exceed 14 points in total.

(i) Covered entries (1 point);

(ii) Nine foot ceilings in living room and all bedrooms (at minimum) (1 point);

(iii) Microwave ovens (1 point);

(iv) Self-cleaning or continuous cleaning ovens (1 point);

(v) Ceiling fixtures in all rooms (light with ceiling fan in living area and all bedrooms) (1 point);

(vi) Refrigerator with icemaker (1 point);

(vii) Laundry connections (2 points);

(viii) Storage room or closet, of approximately 9 square feet or greater, which does not include bedroom, entryway or linen closets - does not need to be in the Unit but must be on the property site (1 point);

(ix) Laundry equipment (washers and dryers) for each individual unit including a front loading washer and dryer in required UFAS compliant Units (3 points);

(x) Thirty year architectural shingle roofing (1 point);

(xi) Covered patios or covered balconies (1 point);

(xii) Covered parking (including garages) of at least one covered space per Unit (2 points);

(xiii) 100% masonry on exterior, which can include stucco, cementitious board products, concrete brick and mortarless concrete masonry, but not EIFS synthetic stucco (3 points);

(xiv) Greater than 75% masonry on exterior, which can include stucco and cementitious board products, concrete brick and mortarless concrete masonry, but not EIFS synthetic stucco (1 points);

(xv) Use of energy efficient alternative construction materials (for example, Structural Insulated Panel construction) with wall insulation at a minimum of R-20 (3 points).

(xvi) R-15 Walls / R-30 Ceilings (rating of wall system) (3 points);

(xvii) 14 SEER HVAC or evaporative coolers in dry climates for New Construction and Reconstruction or radiant barrier in the attic for Rehabilitation (excluding Reconstruction) (3 points);

(xviii) High Speed Internet service to all Units at no cost to residents (2 points); or

(xix) Fire sprinklers in all Units (2 points).

(5) The Commitment of Development Funding by Local Political Subdivisions. Applications may qualify to receive up to 18 points for qualifying under this paragraph provided for under Development Funding. (§2306.6710(b)(1)(E))

(A) Basic Submission Requirements for Scoring. Evidence of the following must be submitted in accordance with the Application Submission Procedures Manual (ASPM).

(i) The loans, grant(s) or in-kind contribution(s) must be attributed to the Total Housing Development Costs, as defined in this chapter, unless otherwise stipulated in this section.

(ii) An Applicant may only submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form. For example, if an Applicant is requesting 18 points, five sources may be submitted if each is for an amount equal to 1% of the Total Housing Development Cost. However, five sources may not be submitted if each source is for an amount equal to 5% of the Total Housing Development Cost.

(iii) An Applicant may substitute any source in response to a Deficiency Notice or after the Application has been submitted to the Department.

(iv) A loan does not qualify as an eligible source unless it has a minimum 5-year term and the interest rate must be at the Applicable Federal Rate (AFR) or below (at the time of application

(v) In-kind contributions such as donation of land, tax exemptions, or waivers of fees such as building permits, water and sewer tap fees, or similar contributions are only eligible if the in-kind

contribution provides a tangible economic benefit that results in a quantifiable Total Housing Development Cost reduction to benefit the Development will be acceptable to qualify for these points. The quantified value of the Total Housing Development Cost reduction may only include the value during the period the contribution or waiver is received and/or assessed Donations of land must be under the control of the Applicant, pursuant to §50.9(h)(7) of this chapter to qualify. The value of in-kind contribution may only include the time period between award, or August 1, 2008 and the Development's Placed in Service date. Contributions in the form of tax exemptions or abatements may only count for points if the contribution is in addition to any tax exemption or abatement required under statute.

(vi) To the extent that a Notice of Funding Availability (NOFA) is released and funds are available, funds from TDHCA's HOME Investment Partnerships (HOME) Program will qualify if a resolution, dated on or before the Application Acceptance deadline, is submitted with the Application from the Local Political Subdivision authorizing the Applicant to act on behalf of the Local Political Subdivision in applying for HOME Funds from TDHCA for the particular application. TDHCA's HOME funds may be substituted for a source originally submitted with the Application, provided the HOME funds substituted are from a NOFA released after the Application Acceptance deadline and a resolution is submitted with the substitution documentation from the Local Political Subdivision authorizing the Applicant to act on behalf of the Local Political Subdivision in applying for HOME Funds from TDHCA for the particular application.

(vii) Development based rental subsidies may qualify under this section if evidence of the remaining value of the contract is submitted from the Local Political Subdivision. The value of the contract does not include past subsidies.

(viii) Evidence to be submitted with the Application must include a copy of the commitment of funds; a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received; or a certification of intent to apply for funding that indicates the funding entity and program to which the application will be submitted, the loan amount to be applied for and the specific proposed terms. For in-kind contributions, evidence must be submitted in the Application from Local Political Subdivision substantiating the value of the in-kind contributions. For in-kind contributions of land, evidence of the value of the contribution must be in the form of an appraisal.

(ix) If not already provided, at the time the executed Commitment Notice is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the governing body of the Local Political Subdivision for the sufficient local funding to the Department. If the funding commitment from the Local Political Subdivision has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment Notice will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the Local Political Subdivision's funds, the Commitment Notice will be rescinded and the credits reallocated.

(x) Funding commitments from a Local Political Subdivision will not be considered final unless the Local Political Subdivision attests to the fact that any funds committed were not first provided to the Local Political Subdivision by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Local Political Subdivision or subsidiary.

(B) Scoring. Points will be determined on a sliding scale based on the percentage of the Total Housing Development Costs of the Development, as reflected in the in the Development Cost Schedule. If a revised Development Cost Schedule is submitted to the Department in response to a deficiency notice at anytime during the review process, the Revised Development Cost Schedule will be utilized for this calculation, and Applicants will be notified of the revised score, consistent with §50.9(e) of this chapter. Do not round for the following calculations. The "total contribution" is the total combined value of qualifying loan(s), grants or in-kind contributions from a Local Political Subdivision pursuant to subparagraph (A) of this subsection.

(i) A total contribution equal to or greater than 1% of the Total Housing Development Cost of the Development receives 6 points; or

(ii) A total contribution equal to or greater than 2.5% of the Total Housing Development Cost of the Development receives 12 points; or

(iii) A total equal to or greater than 5% of the Total Housing Development Cost of the Development receives 18 points.

(6) The Level of Community Support from State Representative or State Senator. The level of community support for the application, evaluated on the basis of written statements received from the State Representative or State Senator that represents the district containing the proposed Development Site. (§2306.6710(b)(1)(F) and (f); §2306.6725(a)(2)) Applications may qualify to receive 14 points for this item. Letters of support must identify the specific Development and must clearly state support for or opposition to the specific Development. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative or Senator by April 1, 2008. State Representatives or Senators to be considered are those State Representatives or Senators in office at the time the Application is submitted. Letters of support from State Representatives or Senators that do not represent the district containing the proposed Development site will not qualify for points under this Exhibit. Neutral letters, or letters that do not specifically refer to the Development, will receive neither positive nor negative points. Letters from State of Texas Representative or Senator: support letters are +14 points; opposition letters are -14 points. If one letter is received in support and one letter is received in opposition the score would be 0 points.

(7) The Rent Levels of the Units. Applications may qualify to receive up to 12 points for qualifying under this exhibit. (§2306.6710(b)(1)(G)) If 80% or fewer of the Units in the Development (excluding any Units reserved for a manager) are restricted to having rents plus the allowance for utilities equal to or below the maximum tax credit rent, then the Development shall be awarded 7 points. If between 81% and 85% of the Units in the Development (excluding any Units reserved for a manager) are restricted to having rents plus the allowance for utilities equal to or below the maximum tax credit rent, then the Development shall be awarded 8 points. If between 86% and 90% of the Units in the Development (excluding any Units reserved for a manager) are restricted to having rents plus the allowance for utilities equal to or below the maximum tax credit rent, then the Development shall be awarded 9 points. If between 91% and 95% of the Units in the Development (excluding any Units reserved for a manager) are restricted to having rents plus the allowance for utilities equal to or below the maximum tax credit rent, then the Development shall be awarded 10 points. If greater than 95% of the Units in the Development (excluding any Units reserved for a

manager) are restricted to having rents plus the allowance for utilities equal to or below the maximum tax credit rent, then the Development shall be awarded 12 points.

(8) The Cost of the Development by Square Foot (Development Characteristics). Applications may qualify to receive 10 points for this item. (§2306.6710(b)(1)(H); §42(m)(1)(C)(iii)) For this exhibit, costs shall be defined as construction costs, including site work, direct hard costs, contingency, contractor profit, overhead and general requirements, as represented in the Development Cost Schedule. This calculation does not include indirect construction costs. The calculation will be costs per square foot of net rentable area (NRA). For the purposes of this subparagraph only, if the proposed Development is an elevator building serving elderly or a high rise building serving any population, the NRA may include elevator served interior corridors. The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule of the Application. Developments qualify for 10 points if their costs do not exceed $85 per square foot for Qualified Elderly, single family design, transitional, and single room occupancy Developments (transitional housing for the homeless and single room occupancy units as provided in the Code, §42(i)(3)(B)(iii) and (iv)), unless located in a "First Tier County" in which case their costs do not exceed $87 per square foot; and $75 for all other Developments, unless designated as "First Tier" by the Texas Department of Insurance, in which case their costs do not exceed $77 per square foot. For 2007, the First Tier counties are Aransas, Brazoria, Calhoun, Chambers, Galveston, Jefferson, Kennedy, Kleberg, Matagorda, Nueces, San Patricio, and Willacy. There are also specifically designated First Tier communities in Harris County that are east of State Highway 146, and evidence in the Application must include a map with the Development site designated clearly within the community. These communities are Pasadena, Morgan's Point, Shoreacres, Seabrook and La Porte. Intergenerational developments will receive 10 points if costs described above do not exceed the square footage limit for elderly and non-elderly units as determined by using the NRA attributable to the respective elderly and non-elderly units. The Department will determine if points will be awarded by multiplying the NRA for elderly units by the applicable square footage limit for the elderly units and adding that total to the result of the multiplication of the NRA for family units by the applicable non-elderly square footage limit. If this maximum cost amount is equal to, or greater than the total of the costs identified above for the application, points will be awarded (10 points).

(9) The Services to be Provided to Tenants of the Development. Applications may qualify to receive up to 8 points. (§2306.6710(b)(1)(I); §2306.6725(a)(1); General Appropriation Act, Article VII, Rider 7) The Applicant must certify that the Development will provide a combination of special supportive services appropriate for the proposed tenants. The provision of supportive services will be included in the LURA as selected from the list of services identified in this paragraph. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided (maximum of 6 points).

(A) Applications will be awarded points for selecting services listed in clause (ii) of this subparagraph based on the following scoring range:

(i) Two points will be awarded for providing two of the services; or

(ii) Four points will be awarded for providing four of the services; or

(iii) Six points will be awarded for providing six of the services.

(B) Service options include child care; transportation; basic adult education; legal assistance; counseling services; GED preparation; English as a second language classes; vocational training; home buyer education; credit counseling; financial planning assistance or courses; health screening services; health and nutritional courses; organized team sports programs or youth programs; scholastic tutoring; any other programs described under Title IV-A of the Social Security Act (§42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families; or any other services approved in writing by the Department.

(C) Applications will receive 2 points for providing Notary Public Services to tenants at no cost to the tenant. This will be included in the LURA.

(10) Declared Disaster Areas. Applications may receive 7 points, if at time the complete Application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development site is located in a Disaster Area as defined in §50.3 of this chapter.

(11) Rehabilitation, (which includes Reconstruction) or Adaptive Reuse. Applications may qualify to receive 6 points. Applications proposing to build solely Rehabilitation (excluding New Construction of non-residential buildings), or solely Reconstruction (excluding New Construction of non-residential buildings) qualify for points.

(12) Housing Needs Characteristics. (§42(m)(1)(C)(ii)) Applications may qualify to receive up to 6 points. Each Application may receive a score if correctly requested in the self score form based on objective measures of housing need in the Area where the Development is located. This Affordable Housing Need Score for each Area will be published in a Site Demographic Characteristics table in the Reference Manual.

(13) Development Includes the Use of Existing Housing as part of a Community Revitalization Plan (Development Characteristics). Applications may qualify to receive 6 points for this item. (§42(m)(1)(C)(iii)) The Development is an Existing Residential Development and proposed any Rehabilitation or any Reconstruction that is part of a Community Revitalization Plan. Evidence of the Community Revitalization Plan and a letter from the governing body stating that the Development Site is located within the targeted development areas outlined in the Community Revitalization Plan must be submitted.

(14) Pre-Application Participation Incentive Points. (§2306.6704) Applications that submitted a Pre-Application during the Pre-Application Acceptance Period and meet the requirements of this paragraph will qualify to receive 6 points for this item. To be eligible for these points, the Application must:

(A) Be for the identical Development Site, or reduced portion of the Development Site as the proposed Development Site under control in the Pre-Application;

(B) Have met the Pre-Application Threshold Criteria;

(C) Be serving the same target population (family, Intergenerational Housing, or elderly) as in the Pre-Application;

(D) Be serving the same target Set-Asides as indicated in the Pre-Application (Set-Asides can be dropped between Pre-Application and Application, but no Set-Asides can be added); and

(E) Be awarded by the Department an Application score that is not more than 5% greater or less than the number of points awarded by the Department at Pre-Application, with the exclusion of points for support and opposition under paragraphs (2), (6), and (18) of this of this subsection. The Application score used to determine whether the Application score is 5% greater or less than the number of points awarded at Pre-Application will also include all point losses under subsection (d)(4) of this section. An Applicant must choose, at the time of Application either clause (i) or (ii) of this subparagraph:

(i) To request the Pre-Application points and have the Department cap the Application score at no greater than the 5% increase regardless of the total points accumulated in the scoring evaluation. This allows an Applicant to avoid penalty for increasing the point structure outside the 5% range from Pre-Application to Application; or

(ii) To request that the Pre-Application points be forfeited and that the Department evaluate the Application as requested in the self-scoring sheet.

(15) Economic Development Initiatives. A Development that is located in one of the following two areas may qualify to receive 4 points:

(A) a Designated State or Federal Empowerment/Enterprise Zone, Urban Enterprise Community, or Urban Enhanced Enterprise Community. To be eligible for these points, Applicants must submit a letter and a map from a city/county official stating that the proposed Development is located within such a designated zone or area; is eligible to receive the state or federal economic development grants or loans; and the city/county still has available funds. The letter should be no older than 6 months from the first day of the Application Acceptance Period. (VII, Rider 6; §2306.127); or

(B) an area that has received an award as of November 1, 2007, within the past three years from the Texas Capital Fund, Texas or Federal Enterprise Zone Fund, Texas Leverage Fund, Industrial Revenue Bond Program, Emerging Technologies, Skills Development, Rural Business Enterprise Grants, Certified Development Company Loans, or Micro Loan Program. Grants that qualify in these areas are included in the Application Reference Manual.

(C) Points under subparagraphs (A) and (B) of this paragraph will not be granted if more than 3 tax credit Developments have been awarded in that area in the last 7 years.

(16) Development Location. (§2306.6725(a)(4)); §42(m)(1)(C)(i)) Applications may qualify to receive 4 points. Evidence, not more than 6 months old from the first day of the Application Acceptance Period, that the subject Property is located within one of the geographical areas described in subparagraphs (A) - (E) of this paragraph. Areas qualifying under any one of the subparagraphs (A) - (E) of this paragraph will receive 4 points. An Application may only receive points under one of the subparagraphs (A) - (E) of this paragraph.

(A) A geographical Area which is an Economically Distressed Area; a Colonia; or a Difficult Development Area (DDA) as specifically designated by the Secretary of HUD at the time of Application submission (§2306.127).

(B) The Development is located in a county that has received an award as of November 1, 2007, within the past three years, from the Texas Department of Agriculture's Rural Municipal Finance Program or Real Estate Development and Infrastructure Program. Cities which have received one of these awards are categorized as awards to the county as a whole so Developments located in a different city than the city awarded, but in the same county, will still be eligible for these points.

(C) The Development is located in a census tract which has a median family income (MFI), as published by the United States Bureau of the Census (U.S. Census), that is higher than the median family income for the county in which the census tract is located. This comparison shall be made using the most recent data available as of the date the Application Round opens the year preceding the applicable program year. Developments eligible for these points must submit evidence documenting the median income for both the census tract and the county. These Census Tracts are outlined in the 2008 Housing Tax Credit Site Demographic Characteristics Report.

(D) The proposed Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and is proposed to be located in an elementary school attendance zone of an elementary school that has an academic rating of "Exemplary" or "Recognized," or comparable rating if the rating system changes. The date for consideration of the attendance zone is that in existence as of the opening date of the Application Round and the academic rating is the most current rating determined by the Texas Education Agency as of that same date. (§42(m)(1)(C)(vii))

(E) The proposed Development will expand affordable housing opportunities for low-income families with children outside of poverty areas. This must be demonstrated by showing that the Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and that the census tract in which the Development is proposed to be located has no greater than 10% poverty population according to the most recent census data. Intergenerational Developments may qualify for points if 70% of the non-elderly Units in the Development have an eligible bedroom mix of two bedrooms or more. (§42(m)(1)(C)(vii)) These Census Tracts are outlined in the 2008 Housing Tax Credit Site Demographic Characteristics Report.

(F) The proposed Qualified Elderly Development will be located in an area with no other existing Qualified Elderly Developments supported by housing tax credits.

(17) Development Location in non-urban Areas. §42(m)(1)(C)(i)) Applications may qualify to receive 6 points if the Development is not located in a Rural Area and has a population less than 100,000 based on the most current Decennial Census.

(18) Demonstration of Community Support other than Quantifiable Community Participation: If an Applicant requests these points on the self scoring form and correctly certifies to the Department that there are no neighborhood organizations that meet the Department's definition of Neighborhood Organization pursuant to §50.3(62) of this chapter and 12 points were awarded under paragraph (2) of this subsection, then that Applicant may receive two points for each letter of support submitted from a community or civic organization that serves the community in which the site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. The community or civic organization must provide some documentation of its existence in the community in which the Development is located to include, but not be limited to, listing of services and/or members, brochures, annual reports, etc. Letters of support from organizations that are not active in the area that includes the location of the Development will not be counted. For purposes of this item, community and civic organizations do not include neighborhood organizations, governmental entities, taxing entities or educational activities. Organizations that were created by a governmental entity or derive their source of creation from a governmental entity do not qualify under this item. For

purposes of this item, educational activities include school districts, trade and vocational schools, charter schools and depending on how characterized could include day care centers; it would not include a PTA or PTO as that is a service organization even though it supports an educational activity. Letters of support received after February 29, 2008, will not be accepted for this item. Two points will be awarded for each letter of support submitted in the Application, not to exceed 6 points. Should an Applicant elect this option and the Application receives letters in opposition by February 29, 2008, then two points will be subtracted from the score for each letter in opposition, provided that the letter is from an organization serving the community. At no time will the Application, however, receive a score lower than zero for this item.

(19) Developments in Census Tracts with No Other Existing Developments Supported by Tax Credits: The Application may receive 6 points if the proposed Development is located in a census tract in which there are no other existing developments supported by housing tax credits. Applicant must provide evidence of the census tract in which the Development is located. (§2306.6725(b)(2)) These Census Tracts are outlined in the 2008 Housing Tax Credit Site Demographic Characteristics Report.

(20) Tenant Populations with Special Housing Needs. Applications may qualify to receive 4 points for this item. (§42(m)(1)(C)(v)) The Department will award these points to Applications in which at least 10% of the Units are set aside for Persons with Special Needs. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development owner agrees to affirmatively market Units to Persons with Special needs. In addition, the Department will require a minimum 12 month period during which units must either be occupied by persons with Special Needs or held vacant. The 12 month period will begin on the date each building receives its certificate of occupancy. For buildings that do not receive a Certificate of Occupancy, the 12 month period will begin on the placed in service date as provided in the Cost Certification manual. After the 12 month period, the owner will no longer be required to hold units vacant for households with special needs, but will be required to continue to affirmatively market units to household with special needs.

(21) Length of Affordability Period. Applications may qualify to receive up to 4 points. (§2306.6725(a)(5); §2306.111(g)(3)(C); §2306.185(a)(1) and (c); §2306.6710(e)(2); §42(m)(1)(B)(ii)(II)) In accordance with the Code, each Development is required to maintain its affordability for a 15-year compliance period and, subject to certain exceptions, an additional 15-year extended use period. Development Owners that are willing to extend the affordability period for a Development beyond the 30 years required in the Code may receive points as follows:

(A) Add 5 years of affordability after the extended use period for a total affordability period of 35 years (2 points); or

(B) Add 10 years of affordability after the extended use period for a total affordability period of 40 years (4 points)

(22) Site Characteristics. Development Sites, including scattered sites, will be evaluated based on proximity to amenities, the presence of positive site features and the absence of negative site features. Sites will be rated based on the criteria in subparagraphs (A) and (B) of this paragraph.

(A) Proximity of site to amenities. Developments Sites located within a one mile radius (two-mile radius for Developments competing for a Rural Regional Allocation) of at least three services appropriate to the target population will receive four points. A site located within one-quarter mile of public transportation that is accessible to all residents including Persons With Disabilities and/or located within a community that has "on demand" transportation, special transit service, or specialized elderly transportation for Qualified Elderly Developments, will receive full points regardless of the proximity to amenities, as long as the Applicant provides appropriate evidence of the transportation services used to satisfy this requirement. If a Development is providing its own specialized van or on demand service, then this will be a requirement of the LURA. Only one service of each type listed in clauses (i) - (xiv) of this subparagraph will count towards the points. A map must be included identifying the Development site and the location of the services. The services must be identified by name on the map. If the services are not identified by name, points will not be awarded. All services must exist or, if under construction, must be at least 50% complete by the date the Application is submitted. (4 points)

(i) Full service grocery store or supermarket.

(ii) Pharmacy.

(iii) Convenience Store/Mini-market.

(iv) Department or Retail Merchandise Store.

(v) Bank/Credit Union.

(vi) Restaurant (including fast food).

(vii) Indoor public recreation facilities, such as civic centers, community centers, and libraries.

(viii) Outdoor public recreation facilities such as parks, golf courses, and swimming pools.

(ix) Hospital/medical clinic.

(x) Medical offices (physician, dentistry, optometry).

(xi) Public Schools (only eligible for Developments that are not Qualified Elderly Developments).

(xii) Senior Center.

(xiii) Dry cleaners.

(xiv) Family video rental (Blockbuster, Hollywood Video, Movie Gallery).

(B) Negative Site Features. Development Sites with the following negative characteristics will have points deducted from their score. For purpose of this exhibit, the term 'adjacent' is interpreted as sharing a boundary with the Development site. The distances are to be measured from all boundaries of the Development site to all boundaries of the property containing the negative site feature. If an Applicant negligently fails to note a negative feature, double points will be deducted from the score or the Application may be terminated. If none of these negative features exist, the Applicant must sign a certification to that effect. (-5 points)

(i) Developments located adjacent to or within 300 feet of junkyards will have 1 point deducted from their score.

(ii) Developments located adjacent to or within 300 feet of active railroad tracks will have 1 point deducted from their score, unless the applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail. Rural Developments funded through TRDO-USDA are exempt from this point deduction.

(iii) Developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants will have 1 point deducted from their score.

(iv) Developments located adjacent to or within 300 feet of a solid waste or sanitary landfills will have 1 point deducted from their score.

(v) Developments where the buildings are located within the "fall line" of high voltage transmission power lines will have 1 point deducted from their score.

(vi) Developments where the buildings are located adjacent to or within 300 feet of a sexually oriented business will have 1 point deducted from their score.

(vii) Developments where the buildings are located within the accident zones or flight paths for commercial or military airports.

(23) Development Size. The Development consists of not more than 36 (3 points).

(24) Qualified Census Tracts with Revitalization. Applications may qualify to receive 1 point for this item. (§42(m)(1)(B)(ii)(III)) Applications will receive the points for this item if the Development is located within a Qualified Census Tract and contributes to a concerted Community Revitalization Plan. Evidence of the Community Revitalization Plan and a letter from the governing body stating that the Development Site is located within the targeted development areas outlined in the Community Revitalization Plan must be submitted.

(25) Sponsor Characteristics. Applications may qualify to receive a maximum of 2 points for this item for qualifying under either subparagraph (A) or (B) of this paragraph. (§42(m)(1)(C)(iv))

(A) An Application will receive these two points for submitting a plan to use Historically Underutilized Businesses in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Applicant will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609.

(B) An Application will receive these points if there is evidence that a HUB that does not meet the experience requirements under subsection (g) of this section, as certified by the Texas Facilities Commission, has at least 51% ownership interest in the General Partner and materially participates in the Development and operation of the Development throughout the Compliance Period. To qualify for these points, the Applicant must submit a certification from the Texas Facilities Commission that the Person is a HUB at the close of the Application Acceptance Period. The HUB will be disqualified from receiving these points if any Principal of the HUB has developed, and received 8609's for, more than two Developments involving tax credits. Additionally, to qualify for these points, the HUB must partner with an experienced developer (as defined by §50.9 of this chapter); the experienced developer, as an Affiliate, will not be subject to the credit limit described under §50.6(d) of this chapter for one application per Application Round. For purposes of this section the experienced developer may not be a Related Party to the HUB.

(26) Developments Intended for Eventual Tenant Ownership - Right of First Refusal. Applications may qualify to receive 1 point for this item. (§2306.6725(b)(1)) (§42(m)(1)(C)(viii)) Evidence that Development Owner agrees to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, §42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department, or either an individual tenant with respect to a single family building, or a tenant cooperative, a resident management corporation in the Development or other association of tenants in the Development with respect to multifamily developments (together, in all such cases, including the tenants of a single family building, a "Tenant Organization"). Development Owner may qualify for these points by providing the right of first refusal in the following terms.

(A) Upon the earlier to occur of:

(i) The Development Owner's determination to sell the Development; or

(ii) The Development Owner's request to the Department, pursuant to §42(h)(6)(E)(II) of the Code, to find a buyer who will purchase the Development pursuant to a "qualified contract" within the meaning of §42(h)(6)(F) of the Code, the Development Owner shall provide a notice of intent to sell the Development ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Development Owner determines that it will sell the Development at the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to expiration of the Compliance Period. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to date upon which the Development Owner intends to sell the Development.

(B) During the two years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Development only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(i) During the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. §92.1 (a "CHDO") and is approved by the Department,

(ii) During the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(iii) During the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department.

(iv) If, during such two-year period, the Development Owner shall receive an offer to purchase the Development at the Minimum Purchase Price from one of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organization), the Development Owner shall sell the Development at the Minimum Purchase Price to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at the Minimum Purchase Price from one or more of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organizations), the Development Owner shall sell the Development at the Minimum Purchase Price to whichever of such organizations it shall choose.

(C) After whichever occurs the later of:

(i) The end of the Compliance Period; or

(ii) Two years from delivery of a Notice of Intent, the Development Owner may sell the Development without regard to any right of first refusal established by the LURA if no offer to purchase the Development at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of 120 days has expired from the date of

acceptance of all such offers as shall have been received without the sale having occurred, provided that the failure(s) to close within any such 120-day period shall not have been caused by the Development Owner or matters related to the title for the Development.

(D) At any time prior to the giving of the Notice of Intent, the Development Owner may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Development for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Development by such organization in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(E) The Department shall, at the request of the Development Owner, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Development at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(F) The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(27) Leveraging of Private, State, and Federal Resources. Applications may qualify to receive 1 point for this item. (§2306.6725(a)(3)) Funding sources used for points under subsection (i)(5) of this section, may not be used for this point item.

(A) Evidence must be submitted in the Application that the proposed Development has received or will receive loan(s), grant(s) or in-kind contributions from a private, state or federal resource, which include Capital Grant Funds and HOPE VI funds, that is equal to or greater than 2% (not using normal rounding) of the Total Housing Development Costs reflected in the Application.

(B) For in-kind contributions, evidence must be submitted in the Application from a private, state or federal resource which substantiates the value of the in-kind contributions. Development based rental subsidies from private, state or federal resource may qualify under this section if evidence of the remaining value of the contract is submitted from the source. The value of the contract does not include past subsidies.

(C) Qualifying funds awarded through local entities may qualify for points if the original source of the funds is from a private, state or federal source. If qualifying funds awarded through local entities are used for this item, a statement from the local entity must be provided that identifies the original source of funds.

(D) Applicants may only submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form. For example, two sources may be submitted if each is for an amount equal to 1% of the Total Housing Development Cost. However, two sources may not be submitted if each source is for an amount equal to 2% of the Total Housing Development Cost.

(E) The funding must be in addition to the primary funding (construction and permanent loans) that is proposed to be utilized and cannot be issued from the same primary funding source or an affiliated source. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Local Political Subdivision.

(F) The Development must have already applied for funding from the funding entity. Evidence to be submitted with the Application must include a copy of the commitment of funds or a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received. At the time the executed Commitment Notice is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the governing body of the entity for the sufficient financing to the Department. If the funding commitment from the private, state or federal source, or qualifying substitute source, has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment Notice will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the commitment from the private, state or federal source, the Commitment Notice will be rescinded and the credits reallocated. Funds from the Department's HOME and Housing Trust Fund sources will only qualify under this category if there is a Notice of Funding Availability (NOFA) out for available funds and the Applicant is eligible under that NOFA.

(G) To qualify for this point, the Rent Schedule must show that at least 3% (not using normal rounding) of all low-income Units are designated to serve individuals or families with incomes at or below 30% of AMGI.

(28) Third-Party Funding Commitment Outside of Qualified Census Tracts. Applications may qualify to receive 1 point for this item. (§2306.6710(e)(1)) Evidence that the proposed Development has documented and committed Third-Party funding sources and the Development is located outside of a Qualified Census Tract. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application. The commitment of funds (an application alone will not suffice) must already have been received from the Third-Party funding source and must be equal to or greater than 2% (not using normal rounding) of the Total Development costs reflected in the Application. Funds from the Department's HOME and Housing Trust Fund sources will not qualify under this category. The third-party funding source cannot be a loan from a commercial lender.

(29) Scoring Criteria Imposing Penalties. (§2306.6710(b)(2))

(A) Penalties will be imposed on an Application if the Applicant has requested an extension of the Carryover or 10% Test deadline, and did not meet the original submission deadline, relating to Developments receiving a housing tax credit commitment made in the Application Round preceding the current round. For each extension request made, the Applicant will receive a 5 point deduction. No penalty points or fees will be deducted for extensions that were requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve TRDO-USDA as a lender if TRDO-USDA or the Department is the cause for the Applicant not meeting the deadline.

(B) Penalties will be imposed on an Application if the Developer or Principal of the Applicant has been removed by the lender, equity provider, or limited partners in the past five years for failure to perform its obligations under the loan documents or limited partnership agreement. An affidavit will be provided by the Applicant and the Developer certifying that they have not been removed as described, or requiring that they disclose each instance of removal with a detailed description of the situation. If an Applicant or Developer submits the affidavit, and the Department learns at a later date that a removal did take place as described, then the Application will be terminated and any Allocation made will be rescinded. The Applicant, Developers or Principals of the Applicant that are in court proceedings at the time of Application must disclose this information and the situation will be evaluated on a case-by-case basis. 3 points will be deducted for each instance of removal.

(C) Penalties will be imposed on an Application if Developer or Principal of the Applicant violates the Adherence to Obligations pursuant to subsection (c) of this section.

(j) Tie Breaker Factors.

(1) In the event that two or more Applications receive the same number of points in any given Set-Aside category, Rural Regional Allocation or Urban/Exurban Regional Allocation, or Uniform State Service Region, and are both practicable and economically feasible, the Department will utilize the factors in this paragraph, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit commitment.

(A) Applications involving any Rehabilitation or Reconstruction of existing Units will win this first tier tie breaker over Applications involving solely New Construction.

(B) The Application located in the municipality or, if located outside a municipality, the county that has the lowest state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins as reflected in the Reference Manual will win this second tier tie breaker.

(C) The amount of requested tax credits per net rentable square foot requested (the lower credits per square foot has preference).

(D) Projects that are intended for eventual tenant ownership. Such Developments must utilize a detached single family site plan and building design and have a business plan describing how the project will convert to tenant ownership at the end of the 15-year compliance period.

(2) This paragraph identifies how ties will be handled when dealing with the restrictions on location identified in §50.5(a)(8) of this chapter, and in dealing with any issues relating to capture rate calculation. When two Tax-Exempt Bond Developments would violate one of these restrictions, and only one Development can be selected, the Department will utilize the reservation docket number issued by the Texas Bond Review Board in making its determination. When two competitive Housing Tax Credits Applications in the Application Round would violate one of these restrictions, and only one Development can be selected, the Department will utilize the tie breakers identified in paragraph (1) of this subsection. When a Tax-Exempt Bond Development and a competitive Housing Tax Credit Application in the Application Round would both violate a restriction, the following determination will be used:

(A) Tax-Exempt Bond Developments that receive their reservation from the Bond Review Board on or before April 30, 2008 will take precedence over the Housing Tax Credit Applications in the 2008 Application Round;

(B) Housing Tax Credit Applications approved by the Board for tax credits in July 2008 will take precedence over the Tax-Exempt Bond Developments that received their reservation from the Bond Review Board on or between May 1, 2008 and July 31, 2008; and

(C) After July 31, 2008, a Tax-Exempt Bond Development with a reservation from the Bond Review Board will take precedence over any Housing Tax Credit Application from the 2008 Application Round on the Waiting List. However, if no reservation has been issued by the date the Board approves an allocation to a Development from the Waiting List of Applications in the 2008 Application Round or a forward commitment, then the Waiting List Application or forward commitment will be eligible for its allocation.

(k) Staff Recommendations. (§2306.1112 and §2306.6731) After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules, the Department staff shall make its recommendations to the Executive Award and Review Advisory Committee. The Committee will develop funding priorities and shall make commitment recommendations to the Board. Such recommendations and supporting documentation shall be made in advance of the meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. The Committee will provide written, documented recommendations to the Board which will address at a minimum the financial or programmatic viability of each Application and a list of all submitted Applications which enumerates the reason(s) for the Development's proposed selection or denial, including all factors provided in §50.10(a) of this chapter that were used in making this determination.

§50.10. Board Decisions; Waiting List; Forward Commitments.

(a) Board Decisions. The Board's decisions shall be based upon the Department's and the Board's evaluation of the proposed Developments' consistency with the criteria and requirements set forth in this QAP and Rules.

(1) On awarding tax credits, the Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, and the reasons for any decision that conflicts with the recommendations made by Department staff. The Board may not make, without good cause, a commitment decision that conflicts with the recommendations of Department staff. Good cause includes the Board's decision to apply discretionary factors. (§2306.6725(c); §42(m)(1)(A)(iv); §2306.6731)

(2) In making a determination to allocate tax credits, the Board shall be authorized to not rely solely on the number of points scored by an Application. It shall in addition, be entitled to take into account, as it deems appropriate, the discretionary factors listed in this paragraph. The Board may also apply these discretionary factors to its consideration of Tax-Exempt Bond Developments. If the Board disapproves or fails to act upon an Application, the Department shall issue to the Applicant a written notice stating the reason(s) for the Board's disapproval or failure to act. In making tax credit decisions (including those related to Tax-Exempt Bond Developments), the Board, in its discretion, may evaluate, consider and apply any one or more of the following discretionary factors: (§2306.111(g)(3))

(A) The developer market study;

(B) The location;

(C) The compliance history of the Developer;

(D) The financial feasibility;

(E) The appropriateness of the Development's size and configuration in relation to the housing needs of the community in which the Development is located;

(F) The Development's proximity to other low-income housing developments;

(G) The availability of adequate public facilities and services;

(H) The anticipated impact on local school districts;

(I) Zoning and other land use considerations;

(J) Any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes; and

(K) Other good cause as determined by the Board.

(3) Before the Board approves any Application, the Department shall assess the compliance history of the Applicant with respect to all applicable requirements; and the compliance issues associated with the proposed Development, including compliance information provided by the Texas State Affordable Housing Corporation. The Committee shall provide to the Board a written report regarding the results of the assessments. The written report will be included in the appropriate Development file for Board and Department review. The Board shall fully document and disclose any instances in which the Board approves a Development Application despite any noncompliance associated with the Development or Applicant. (§2306.057)

(b) Waiting List. (§2306.6711(c) and (d)) If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Board shall generate, concurrently with the issuance of commitments, a waiting list of additional Applications ranked by score in descending order of priority based on Set-Aside categories and regional allocation goals. The Board may also apply discretionary factors in determining the Waiting List. If at any time prior to the end of the Application Round, one or more Commitment Notices expire and a sufficient amount of the State Housing Credit Ceiling becomes available, the Board shall issue a Commitment Notice to Applications on the waiting list subject to the amount of returned credits, the regional allocation goals and the Set-Aside categories, including the 10% Nonprofit Set-Aside allocation and 15% At-Risk Set-Aside allocation and 5% USDA Set-Aside required under the Code, §42(h)(5). At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated. The Applicant may re-apply to the Department during the next Application Acceptance Period.

(c) Forward Commitments. The Board may determine to issue commitments of tax credit authority with respect to Applications from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment") to Applications submitted in accordance with the rules and timelines required under this rule and the Application Submission Procedures Manual. The Board will utilize its discretion in determining the amount of credits to be allocated as forward commitments and the reasons for those commitments considering score and discretionary factors. The Board may utilize the forward commitment authority to allocate credits to TRDO-USDA Developments which are experiencing foreclosure or loan acceleration at any time during the 2008 calendar year, also referred to as Rural Rescue Developments. Applications that are submitted under the 2008 QAP and granted a Forward Commitment of 2009 Housing Tax Credits are considered by the Board to comply with the 2009 QAP by having satisfied the requirements of this 2008 QAP, except for statutorily required QAP changes.

(1) Unless otherwise provided in the Commitment Notice with respect to a Development selected to receive a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the Credit Ceiling from which the credits are allocated.

(2) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. If a forward commitment shall be made with respect to a Development placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(3) If tax credit authority shall become available to the Department in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Development which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Development.

§50.11. Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants; Viewing of Pre-Applications and Applications; Confidential Information.

(a) Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants.

(1) Within approximately 14 days after the close of the Pre-Application Acceptance Period, the Department shall publish a Pre-Application Submission Log on its web site. Such log shall contain the Development name, address, Set-Aside, number of units, requested credits, owner contact name and phone number. (§2306.6717(a)(1))

(2) Approximately 30 days before the close of the Application Acceptance Period, the Department will release the evaluation and assessment of the Pre-Applications on its web site.

(3) Not later than 14 days after the close of the Pre-Application Acceptance Period, or Application Acceptance Period for Applications for which no Pre-Application was submitted, the Department shall: (§2306.1114)

(A) Publish an Application submission log on its web site.

(B) Give notice of a proposed Development in writing that provides the information required under clause (i) of this subparagraph to all of the individuals and entities described in clauses (ii) - (x) of this subparagraph. (§2306.6718(a) - (c))

(i) The following information will be provided in these notifications:

(I) The relevant dates affecting the Application including the date on which the Application was filed, the date or dates on which any hearings on the Application will be held and the date by which a decision on the Application will be made;

(II) A summary of relevant facts associated with the Development;

(III) A summary of any public benefits provided as a result of the Development, including rent subsidies and tenant services; and

(IV) The name and contact information of the employee of the Department designated by the director to act as the information officer and liaison with the public regarding the Application.

(ii) Presiding officer of the governing body of the political subdivision containing the Development (mayor or county judge) to advise such individual that the Development, or a part thereof, will be located in his/her jurisdiction and request any comments which such individual may have concerning such Development.

(iii) If the Department receives a letter from the mayor or county judge of an affected city or county that expresses opposition to the Development, the Department will give consideration to the objections raised and will offer to visit the proposed site or Development with the mayor or county judge or their designated representative within 30 days of notification. The site visit must occur before the Housing Tax Credit can be approved by the Board. The Department will obtain reimbursement from the Applicant for the necessary travel and expenses at rates consistent with the state authorized rate (General Appropriation Act, Article VII, Rider 5) (§42(m)(1));

(iv) Any member of the governing body of a political subdivision who represents the Area containing the Development. If the governing body has single-member districts, then only that member of the governing body for that district will be notified, however if the governing body has at-large districts, then all members of the governing body will be notified;

(v) State representative and state senator who represent the community where the Development is proposed to be located. If the state representative or senator host a community meeting, the Department, if timely notified, will ensure staff are in attendance to provide information regarding the Housing Tax Credit Program; (General Appropriation Act, Article VII, Rider 8(d))

(vi) United States representative who represents the community containing the Development;

(vii) Superintendent of the school district containing the Development;

(viii) Presiding officer of the board of trustees of the school district containing the Development;

(ix) Any Neighborhood Organizations on record with the city or county in which the Development is to be located and whose boundaries contain the proposed Development site or otherwise known to the Applicant or Department and on record with the state or county; and

(x) Advocacy organizations, social service agencies, civil rights organizations, tenant organizations, or others who may have an interest in securing the development of affordable housing that are registered on the Department's email list service.

(C) The Department shall maintain an electronic mail notification service that will notify a subscriber, by zip code, of: (§2306.67171)

(i) The receipt of a Pre-Application or Application within 14 days of receipt;

(ii) The publication of materials to be presented to the Board for the Pre-Application or Application referred to in subsection (i) of this section; and

(iii) Any public hearing for the Pre-Application or Application referred to in subsection (i) of this section.

(D) The elected officials identified in subparagraph (B) of this paragraph will be provided an opportunity to comment on the Application during the Application evaluation process. (§42(m)(1))

(4) The Department shall hold at least three public hearings in different Uniform State Service Regions of the state to receive comment on the submitted Applications and on other issues relating to the Housing Tax Credit Program for competitive Applications under the State Housing Credit Ceiling. (§2306.6717(c))

(5) The Department shall make available on the Department's website information regarding the Housing Tax Credit Program including notice of public hearings, meetings, Application Round opening and closing dates, submitted Applications, and Applications approved for underwriting and recommended to the Board, and shall provide that information to locally affected community groups, local and state elected officials, local housing departments, any appropriate newspapers of general or limited circulation that serve the community in which a proposed Development is to be located, nonprofit and for-profit organizations, on-site property managers of occupied Developments that are the subject of Applications for posting in prominent locations at those Developments, and any other interested persons including community groups, who request the information. (§2306.6717(b))

(6) Approximately forty days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will notify each Applicant of the receipt of any opposition received by the Department relating to his or her Development at that time.

(7) Not later than the third working day after the date of completion of each stage of the Application process, including the results of the Application scoring and underwriting phases and the commitment phase, the results will be posted to the Department's web site. (§2306.6717(a)(3))

(8) At least thirty days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will:

(A) Provide the Application scores to the Board; (§2306.6711(a))

(B) If feasible, post to the Department's web site the entire Application, including all supporting documents and exhibits, the Application Log as further described in §50.19(b) of this chapter, a scoring sheet providing details of the Application score, and any other documents relating to the processing of the Application. (§2306.6717(a)(1) and (2))

(9) A summary of comments received by the Department on specific Applications shall be part of the documents required to be reviewed by the Board under this subsection if it is received 30 business days prior to the date of the Board Meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. Comments received after this deadline will not be part of the documentation submitted to the Board. However, a public comment period will be available prior to the Board's decision, at the Board meeting where tax credit commitment decisions will be made.

(10) Not later than the 120th day after the date of the initial issuance of Commitment Notices for housing tax credits, the Department shall provide an Applicant who did not receive a commitment for housing tax credits with an opportunity to meet and discuss with the Department the Application's deficiencies, scoring and underwriting. (§2306.6711(e))

(b) Viewing of Pre-Applications and Applications. Pre-Applications and Applications for tax credits are public information and are available upon request after the Pre-Application and Application Acceptance Periods close, respectively. All Pre-Applications and Applications, including all exhibits and other supporting materials, except Personal Financial Statements and Social Security numbers, will be made available for public disclosure after the Pre-Application and Ap-

plication periods close, respectively. The content of Personal Financial Statements may still be made available for public disclosure upon request if the Attorney General's office deems it is not protected from disclosure by the Texas Public Information Act.

(c) Confidential Information. The Department may treat the financial statements of any Applicant as confidential and may elect not to disclose those statements to the public. A request for such information shall be processed in accordance with §552.305 of the Government Code. (§2306.6717(d))

§50.12. Tax-Exempt Bond Developments: Filing of Applications; Applicability of Rules; Supportive Services; Financial Feasibility Evaluation; Satisfaction of Requirements.

(a) Filing of Applications for Tax-Exempt Bond Developments. Applications for a Tax-Exempt Bond Development may be submitted to the Department as described in paragraphs (1) and (2) of this subsection:

(1) Applicants which receive advance notice of a Program Year 2008 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap must file a complete Application not later than 12:00 p.m. on December 28, 2007. Such filing must be accompanied by the Application fee described in §50.20 of this chapter.

(2) Applicants which receive advance notice of a Program Year 2008 reservation after being placed on the waiting list as a result of the TBRB lottery for private activity volume cap must submit Volume 1 and Volume 2 of the Application and the Application fee described in §50.20 of this chapter prior to the Applicant's bond reservation date as assigned by the TBRB. Those applications designated as Priority 3 by the TBRB must submit Volumes I and II within 14 days of the bond reservation date if the Applicant intends to apply for tax credits regardless of the Issuer. Any outstanding documentation required under this section regardless of Priority must be submitted to the Department at least 60 days prior to the Board meeting at which the decision to issue a Determination Notice would be made unless a waiver is requested by the Applicant. The Department staff will have limited discretion to recommend an Application with appropriate justification of the late submission.

(3) Applications involving multiple sites must submit the required information as outlined in the Application Submission Procedures Manual. The Application will be considered to be one Application as identified in Chapter 1372, Texas Government Code.

(b) Applicability of Rules for Tax-Exempt Bond Developments. Tax-Exempt Bond Development Applications are subject to all rules in this chapter, with the only exceptions being the following sections: §50.4 of this chapter (regarding State Housing Credit Ceiling), §50.7 of this chapter (regarding Regional Allocation and Set-Asides), §50.8 of this chapter (regarding Pre-Application), §50.9(d) and (f) of this chapter (regarding Evaluation Processes for Competitive Applications and Rural Rescue Applications), §50.9(i) of this chapter (regarding Selection Criteria), §50.10(b) and (c) of this chapter (regarding Waiting List and Forward Commitments), and §50.14(a) and (b) of this chapter (regarding Carryover and 10% Test). Such Developments requesting a Determination Notice in the current calendar year must meet all Threshold Criteria requirements stipulated in §50.9(h) of this chapter. Such Developments which received a Determination Notice in a prior calendar year must meet all Threshold Criteria requirements stipulated in the QAP and Rules in effect for the calendar year in which the Determination Notice was issued; provided, however, that such Developments shall comply with all procedural requirements for obtaining Department action in the current QAP and Rules; and such other requirements of the QAP and Rules as the Department determines applicable. This documentation must be submitted no later than 14 days before the Board meeting where the credits will be considered. Applicants will be required to meet all conditions of the Determination Notice by the time the construction loan is closed unless otherwise specified in the Determination Notice. Applicants must meet the requirements identified in §50.15 of this chapter. No later than 60 days following closing of the bonds, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan (as further described in the Carryover Allocation Procedures Manual), and evidence must be provided at this time of attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five hours and the Development architect at Department-approved Fair Housing training relating to design issues for at least five hours. Certifications must not be older than two years. Applications that receive a reservation from the Bond Review Board on or before December 31, 2007 will be required to satisfy the requirements of the 2007 QAP; Applications that receive a reservation from the Bond Review Board on or after January 1, 2008 will be required to satisfy the requirements of the 2008 QAP.

(c) Supportive Services for Tax-Exempt Bond Developments. Tax-Exempt Bond Development Applications must provide an executed agreement with a qualified service provider for the provision of special supportive services that would otherwise not be available for the tenants. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided. The provision of these services will be included in the LURA. Acceptable services as described in paragraphs (1) - (3) of this subsection include:

(1) The services must be in at least one of the following categories: child care, transportation, notary public service, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, organized team sports programs, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities;

(2) Any other program described under Title IV-A of the Social Security Act (§42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families, or

(3) Any other services approved in writing by the Issuer. The plan for tenant supportive services submitted for review and approval of the Issuer must contain a plan for coordination of services with state workforce development and welfare programs. The coordinated effort will vary depending upon the needs of the tenant profile at any given time as outlined in the plan.

(d) Financial Feasibility Evaluation for Tax-Exempt Bond Developments. Code §42(m)(2)(D) requires the bond issuer (if other than the Department) to ensure that a Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Development for this purpose in accordance with the QAP and the Underwriting Rules and Guidelines, §1.32 of this title or request that the Department perform the function. If the issuer underwrites the Development, the Department will, nonetheless, review the underwriting report and may make such changes in the

amount of credits which the Development may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Development is determined to be eligible in accordance with this subsection, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits, from the amount specified in the Determination Notice, at the time of each building's placement in service will only be permitted if it is determined by the Department, as required by Code §42(m)(2)(D), that the Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Increases to the amount of tax credits that exceed 110% of the amount of credits reflected in the Determination Notice are contingent upon approval by the Board. Increases to the amount of tax credits that do not exceed 110% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director.

(e) Satisfaction of Requirements for Tax-Exempt Bond Developments. If the Department staff determines that all requirements of this QAP and Rules have been met, the Department will recommend that the Board authorize the issuance of a Determination Notice. The Board, however, may utilize the discretionary factors identified in §50.10(a) of this chapter in determining if they will authorize the Department to issue a Determination Notice to the Development Owner. The Determination Notice, if authorized by the Board, will confirm that the Development satisfies the requirements of the QAP and Rules in accordance with the Code, §42(m)(1)(D).

(f) Certification of Tax Exempt Applications with New Docket Numbers. Applications that are processed through the Department review and evaluation process and receive an affirmative Board Determination, but do not close the bonds prior to the bond reservation expiration date, and subsequently have that docket number withdrawn from the Bond Review Board, may have their Determination Notice reinstated. The Applicant would need to receive a new docket number from the Texas Bond Review Board. One of the following must apply:

(1) The new docket number must be issued in the same program year as the original docket number and must not be more than four months from the date the original application was withdrawn from the BRB. The application must remain unchanged. This means that at a minimum, the following can not have changed: site control, total number of units, unit mix (bedroom sizes and income restrictions), design/site plan documents, financial structure including bond and housing tax credit amounts, development costs, rent schedule, operating expenses, sources and uses, ad valorem tax exemption status, target population, scoring criteria (TDHCA issues) or BRB priority status including the effect on the inclusive capture rate. Note that the entities involved in the applicant entity and developer can not change; however, the certification can be submitted even if the lender, syndicator or issuer changes, as long as the financing structure and terms remain unchanged. Notifications under §50.9(h)(8) of this chapter are not required to be reissued. In the event that the Department's Board has already approved the application for tax credits, the application is not required to be presented to the Board again (unless there is public opposition) and a revised Determination Notice will be issued once notice of the assignment of a new docket number has been provided to the Department and the Department has confirmed that the capture rate and market demand remain acceptable. This certification must be submitted no later than thirty days after the date the Bond Review Board issues the new docket number and no later than thirty days before the anticipated closing. In the event that the Department's Board has not yet approved the application, the application will continue to be processed and ultimately provided to the Board for consideration. This certification must be submitted no later than thirty days after the date the Bond Review Board issues the new docket number and no later than forty-five days before the anticipated Department's Board meeting date.

(2) If there are changing to the Application as referenced in paragraph (1) of this subsection, the Application will be required to submit a new Application in full, along with the applicable fees, to be reviewed and evaluated in its entirety for a new determination notice to be issued.

§50.13. Commitment and Determination Notices; Agreement and Election Statement; Documentation Submission Requirements.

(a) Commitment and Determination Notices. If the Board approves an Application the Department will:

(1) If the Application is for a commitment from the State Housing Credit Ceiling, issue a Commitment Notice to the Development Owner which shall:

(A) Confirm that the Board has approved the Application; and

(B) State the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in §50.16 of this chapter, and compliance by the Development Owner with the remaining requirements of this chapter and any other terms and conditions set forth therein by the Department. This commitment shall expire on the date specified therein unless the Development Owner indicates acceptance of the commitment by executing the Commitment Notice or Determination Notice, pays the required fee specified in §50.20 of this chapter, and satisfies any other conditions set forth therein by the Department. The Commitment Notice expiration date may not be extended.

(2) If the Application regards a Tax-Exempt Bond Development, issue a Determination Notice to the Development Owner which shall:

(A) Confirm the Board's determination that the Development satisfies the requirements of this QAP; and

(B) State the Department's commitment to issue IRS Form(s) 8609 to the Development Owner in a specified amount, subject to the requirements set forth in §50.12 of this chapter and compliance by the Development Owner with all applicable requirements of this chapter and any other terms and conditions set forth therein by the Department. The Determination Notice shall expire on the date specified therein unless the Development Owner indicates acceptance by executing the Determination Notice and paying the required fee specified in §50.20 of this chapter. The Determination Notice shall also expire unless the Development Owner satisfies any conditions set forth therein by the Department within the applicable time period.

(3) Notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Board's issuance of a Commitment Notice or Determination Notice, as applicable.

(4) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or Rehabilitation exceeds the limitations established from time to time by the Department and the Board, unless the Department staff make a recommendation to the Board based on the need to fulfill the goals of the Housing Tax Credit Program as expressed in this QAP and Rules, and

the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented.

(5) A Commitment or Determination Notice shall not be issued with respect to the Applicant, the Development Owner, the General Contractor, or any Affiliate of the General Contractor that is active in the ownership or Control of one or more other low-income rental housing properties in the state of Texas administered by the Department that is in Material Noncompliance with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for such property, as described in Chapter 60 of this title.

(6) The executed Commitment or Determination Notice must be returned to the Department on the date specified with the Commitment Notice or Determination Notice, which shall be no earlier than ten days of the effective date of the Notice.

(b) Agreement and Election Statement. Together with the Development Owner's acceptance of the Carryover Allocation, the Development Owner may execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the Applicable Percentage for the Development as that for the month in which the Carryover Allocation was accepted (or the month the bonds were issued for Tax-Exempt Bond Developments), as provided in the Code, §42(b)(2). Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Development Owner to make an effective election to fix the Applicable Percentage for a Development, the Carryover Allocation Document must be executed by the Department and the Development Owner within the same month. The Department staff will cooperate with a Development Owner, as possible or reasonable, to assure that the Carryover Allocation Document can be so executed.

(c) Documentation Submission Requirements at Commitment of Funds. No later than the date the Commitment Notice or Determination Notice is executed by the Applicant and returned to the Department with the appropriate Commitment Fee as further described in §50.20(f) of this chapter, the following documents must also be provided to the Department. Failure to provide these documents may cause the Commitment to be rescinded. For each Applicant all of the following must be provided:

(1) Evidence that the entity has the authority to do business in Texas;

(2) A Certificate of Account Status from the Texas Comptroller of Public Accounts or, if such a Certificate is not available because the entity is newly formed, a statement to such effect; and a Certificate of Organization from the Secretary of State;

(3) Copies of the entity's governing documents, including, but not limited to, its Articles of Incorporation, Articles of Organization, Certificate of Limited Partnership, Bylaws, Regulations and/or Partnership Agreement; and

(4) Evidence that the signer(s) of the Application have the authority to sign on behalf of the Applicant in the form of a corporate resolution or by-laws which indicate same from the sub-entity in Control and that those Persons signing the Application constitute all Persons required to sign or submit such documents.

§50.14. Carryover; 10% Test; Commencement of Substantial Construction.

(a) Carryover. All Developments which received a Commitment Notice, and will not be placed in service and receive IRS Form 8609 in the year the Commitment Notice was issued, must submit the Carryover documentation to the Department no later than November 1 of the year in which the Commitment Notice is issued pursuant to §42(h)(I)(c) IRC. Commitments for credits will be terminated if the Carryover documentation, or an approved extension, has not been received by this deadline. In the event that a Development Owner intends to submit the Carryover documentation in any month preceding November of the year in which the Commitment Notice is issued, in order to fix the Applicable Percentage for the Development in that month, it must be submitted no later than the first Friday in the preceding month. If the financing structure, syndication rate, amount of debt or syndication proceeds are revised at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be reevaluated by the Department. The Carryover Allocation format must be properly completed and delivered to the Department as prescribed by the Carryover Allocation Procedures Manual. All Carryover Allocations will be contingent upon the following, in addition to all other conditions placed upon the Application in the Commitment Notice:

(1) The Development Owner for all New Construction Developments must have purchased the property for the Development.

(2) A current original plat or survey of the land, prepared by a duly licensed Texas Registered Professional Land Surveyor. Such survey shall conform to standards prescribed in the Manual of Practice for Land Surveying in Texas as promulgated and amended from time to time by the Texas Surveyors Association as more fully described in the Carryover Procedures Manual.

(3) For all Developments involving New Construction, evidence of the availability of all necessary utilities/services to the Development site must be provided. Necessary utilities include natural gas (if applicable), electric, trash, water, and sewer. Such evidence must be a letter or a monthly utility bill from the appropriate municipal/local service provider. If utilities are not already accessible, then the letter must clearly state: an estimated time frame for provision of the utilities, an estimate of the infrastructure cost, and an estimate of any portion of that cost that will be borne by the Development Owner. Letters must be from an authorized individual representing the organization which actually provides the services. Such documentation should clearly indicate the Development property. If utilities are not already accessible (undeveloped areas), then the letter should not be older than three months from the first day of the Application Acceptance Period.

(4) The Department will not execute a Carryover Allocation Agreement with any Owner in Material Noncompliance on October 1, 2008.

(b) 10% Test. No later than six months from the date the Carryover Allocation Document is executed by the Department and the Development Owner, more than 10% of the Development Owner's reasonably expected basis must have been incurred pursuant to §42(h)(1)(E)(i) and (ii) of the Internal Revenue Code and Treasury Regulations, §1.42-6. The evidence to support the satisfaction of this requirement must be submitted to the Department no later than June 30 of the year following the execution of the Carryover Allocation Document in a format prescribed by the Department. At the time of submission of the documentation, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan as further described in the Carryover Allocation Procedures Manual. Evidence must be provided at this time of attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five hours and the Development architect and engineer at Department-approved Fair Housing training relating to design issues for at least five hours on or before the time the 10% Test Documentation is submitted. Certifications must not be older than two years.

(c) Commencement of Substantial Construction. The Development Owner must submit evidence of having commenced and con-

tinued substantial construction activities as defined in Chapter 60 of this title. The evidence must be submitted not later than December 1 of the year after the execution of the Carryover Allocation Document with the possibility of an extension as described in §50.20 of this chapter.

§50.15. LURA, Cost Certification.

(a) Land Use Restriction Agreement (LURA). The Development Owner must request a LURA from the Department no later than the date specified in Chapter 60 of this title, the Department's Compliance Rules. The Development Owner must date, sign and acknowledge before a notary public the LURA and send the original to the Department for execution. The initial compliance and monitoring fee must be accompanied by a statement, signed by the Owner, indicating the start of the Development's Credit Period and the earliest placed in service date for the Development buildings. After receipt of the signed LURA from the Department, the Development Owner shall then record the LURA, along with any and all exhibits attached thereto, in the real property records of the county where the Development is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department no later than the date that the Cost Certification Documentation is submitted to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Development and/or the Property prior to the recording of the LURA, the Development Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA, which are required by §42(h)(6)(E)(ii) of the Code to remain in effect following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department, or assigns, shall physically inspect the Development for compliance with the Application and the representations, warranties, covenants, agreements and undertakings contained therein. Such inspection will be conducted before the IRS Form 8609 is issued for a building, but it shall be conducted in no event later than the end of the second calendar year following the year the last building in the Development is placed in service. The Development Owner for Tax-Exempt Bond Developments shall obtain a subordination agreement wherein the lien of the mortgage is subordinated to the LURA. The LURA shall contain any provision which requires the Development Owner to restrict rents and incomes at any AMGI level, as approved by the Board. The restricted gross rents for any AMGI level outlined in the LURA will be calculated in accordance with §42(g)(2)(A), Internal Revenue Code.

(b) Cost Certification. The Cost Certification Procedures Manual sets forth the documentation required for the Department to perform a feasibility analysis in accordance with §42(m)(2)(C)(i)(II), Internal Revenue Code, and determine the final Credit to be allocated to the Development.

(1) To request IRS Forms 8609, Developments must have:

(A) Placed in Service by December 31 of the year the Commitment Notice was issued if a Carryover Allocation was not requested and received; or December 31 of the second year following the year the Carryover Allocation Agreement was executed;

(B) Scheduled a final construction inspection in accordance with Chapter 60 of this title, the Department's Compliance Monitoring Policies and Procedures;

(C) Informed the Department of and received written approval for all Development amendments in accordance with §50.17(c) of this chapter;

(D) Submitted to the Department the LURA in accordance with subsection (a) of this section;

(E) Paid all applicable Department fees; and

(F) Prepared all Cost Certification documentation as more fully described in the Cost Certification Procedures Manual.

(i) Carryover Allocation Agreement/Determination Notice and Election Statement;

(ii) Owner's Statement of Certification;

(iii) Owner Summary;

(iv) Evidence of Nonprofit and CHDO Participation;

(v) Evidence of Historically Underutilized Business (HUB) Participation;

(vi) Development Summary;

(vii) As-Built Survey;

(viii) Closing Statement;

(ix) Title Policy;

(x) Evidence of Placement in Service;

(xi) Independent Auditor's Reports;

(xii) Total Development Cost Schedule;

(xiii) AIA Form G702 and G703, Application and Certificate for Payment;

(xiv) Rent Schedule;

(xv) Utility Allowance;

(xvi) Annual Estimated Operating Expenses and 15-Year Proforma;

(xvii) Current Annual Operating Statement and Rent Roll;

(xviii) Final Sources of Funds;

(xix) Executed Limited Partnership Agreement;

(xx) Loan Agreement or Firm Commitment;

(xxi) Architect's Certification of Fair Housing Requirements; and

(xxii) TDHCA Compliance Workshop Certificate.

(2) Required Cost Certification documentation must be received by the Department no later than January 15 following the year the Credit Period begins. Any Developments issued a Commitment Notice or Determination Notice that fails to submit its Cost Certification documentation by this deadline will be reported to the IRS and the Owner will be required to submit a request for extension consistent with §50.20(l) of this chapter.

(3) The Department will perform an initial evaluation of the Cost Certification documentation within 45 days from the date of receipt and notify the Owner in a deficiency letter of all additional required documentation. Any deficiency letters issued to the Owner pertaining to the Cost Certification documentation will also be copied to the syndicator. The Department will issue IRS Forms 8609 no later than 90 days from the date that all required documents have been received.

(4) The Department will perform an evaluation to determine if the Applicant is in Material Noncompliance with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for the subject property, as

described in Chapter 60 of the Department's Compliance Rules prior to issuance of IRS Forms 8609.

§50.16. Housing Credit Allocations.

(a) In making a commitment of a Housing Credit Allocation under this chapter, the Department shall rely upon information contained in the Application to determine whether a building is eligible for the credit under the Code, §42. The Development Owner shall bear full responsibility for claiming the credit and assuring that the Development complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that a Development Owner who receives a Housing Credit Allocation from the Department will qualify for the housing credit.

(b) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Development throughout the affordability period. (§2306.6711(b)) Such determination shall be made by the Department at the time of issuance of the Commitment Notice or Determination Notice; at the time the Department makes a Housing Credit Allocation; and as of the date each building in a Development is placed in service. Any Housing Credit Allocation Amount specified in a Commitment Notice, Determination Notice or Carryover Allocation Document is subject to change by the Department based upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), and the department in no way or manner represents or warrants to any Applicant, sponsor, investor, lender or other entity that the Development is, in fact, feasible or viable.

(c) The General Contractor hired by the Development Owner must meet specific criteria as defined by the General Appropriation Act, Article VII, Rider 8(c). A General Contractor hired by a Development Owner or a Development Owner, if the Development Owner serves as General Contractor must demonstrate a history of constructing similar types of housing without the use of federal tax credits. Evidence must be submitted to the Department, in accordance with §50.9(h)(4)(H) of this chapter, which sufficiently documents that the General Contractor has constructed some housing without the use of Housing Tax Credits. This documentation will be required as a condition of the commitment notice or carryover agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) An allocation will be made in the name of the Development Owner identified in the related Commitment Notice or Determination Notice. If an allocation is made to a member or Affiliate of the ownership entity proposed at the time of Application, the Department will transfer the allocation to the ownership entity as consistent with the intention of the Board when the Development was selected for an award of tax credits. Any other transfer of an allocation will be subject to review and approval by the Department consistent with §50.17(c) of this chapter. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under §42 of the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete current documentation regarding the owner including documentation to show consistency with all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant.

(e) The Department shall make a Housing Credit Allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Development Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §50.20 of this chapter have been received by the Department and with respect to which all applicable requirements, terms and conditions have been met. For Tax-Exempt Bond Developments, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Development with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The Cost Certification documentation requirements will include a certification and inspection report prepared by a Third-Party accessibility specialist to certify that the Development meets all required accessibility standards. IRS Form 8609 will not be issued until the certifications are received by the Department. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Development Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will occur only after the Development Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for Housing Tax Credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification materials. A separate Housing Credit Allocation shall be made with respect to each building within a Development which is eligible for a housing credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a Development basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Development until the issuance of IRS Form 8609s with respect to such buildings. The Department may delay the issuance of IRS Form 8609 if any Development violates the representations of the Application.

(f) In making a Housing Credit Allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum Applicable Percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The Housing Credit Allocation made by the Department shall not exceed the amount necessary to support the extended low-income housing commitment as required by the Code, §42(h)(6)(C)(i).

(g) Development inspections shall be required to show that the Development is built or rehabilitated according to construction threshold criteria and Development characteristics identified at application. At a minimum, all Development inspections must meet Uniform Physical Condition Standards (UPCS) as referenced in Treasury Regulation §1.42-5 (d)(2)(ii) and include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Development is placed in service. All such Development inspections shall be performed by the Department or by an independent Third Party inspector acceptable to the Department. The Development Owner shall pay all fees and costs of said inspections as described in §50.20 of this chapter. Details regarding the construction inspection process are set forth in the Department Rule Chapter 60 of this title, the Department's Compliance Monitoring Policies and Procedures (§2306.081; General Appropriation Act, Article VII, Rider 8(b)).

(h) After the entire Development is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document and as further outlined in §50.15 of this chapter, the Development Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the

Cost Certification Procedures Manual. For purposes of this chapter, and consistent with IRS Notice 88-116, the placed in service date for a new or existing building used as residential rental property is the date on which the building is ready and available for its specifically assigned function and more specifically when the first Unit in the building is certified as being suitable for occupancy in accordance with state and local law and as certified by the appropriate local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire Development; therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the New Construction or Rehabilitation and, if applicable, a closing statement for the acquisition of the Development as well as for the closing of all interim and permanent financing for the Development. If the Development Owner does not fulfill all representations and commitments made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609, may withhold issuance of the IRS Form 8609s until these representations and commitments are met, and/or may terminate the allocation, if appropriate corrective action is not taken by the Development Owner.

(i) The Board at its sole discretion may allocate credits to a Development Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Development's financial viability.

(j) The Department may, at any time and without additional administrative process, determine to award credits to Developments previously evaluated and awarded credits if it determines that such previously awarded credits are or may be invalid and the owner was not responsible for such invalidity.

(k) If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Department will impose a penalty on the score for any Competitive Housing Tax Credit applications submitted by that Applicant or any Affiliate of that Applicant for any application in an Application Round occurring concurrent to the return of credits or if no Application Round is pending the Round immediately following the return of credits. The penalty will be assessed in an amount that reduces the Applicant's final awarded score by an additional 20%.

§50.17. Board Reevaluation, Appeals Process; Provision of Information or Challenges Regarding Applications; Amendments; Housing Tax Credit and Ownership Transfers; Sale of Tax Credit Properties; Withdrawals; Cancellations; Alternative Dispute Resolution.

(a) Board Reevaluation. (§2306.6731(b)) Regardless of development stage, the Board shall reevaluate a Development that undergoes a substantial change between the time of initial Board approval of the Development and the time of issuance of a Commitment Notice or Determination Notice for the Development. For the purposes of this subsection, substantial change shall be those items identified in subsection (d)(4) of this section. The Board may revoke any Commitment Notice or Determination Notice issued for a Development that has been unfavorably reevaluated by the Board.

(b) Appeals Process. (§2306.6715) An Applicant may appeal decisions made by the Department as follows.

(1) The decisions that may be appealed are identified in subparagraphs (A) - (D) of this paragraph.

(A) A determination regarding the Application's satisfaction of:

(i) Eligibility Requirements;

(ii) Disqualification or debarment criteria;

(iii) Pre-Application or Application Threshold Criteria;

(iv) Underwriting Criteria;

(B) The scoring of the Application under the Application Selection Criteria; and

(C) A recommendation as to the amount of housing tax credits to be allocated to the Application.

(D) Any Department decision that results in termination of an Application.

(2) An Applicant may not appeal a decision made regarding an Application filed by another Applicant.

(3) An Applicant must file its appeal in writing with the Department not later than the seventh day after the date the Department publishes the results of any stage of the Application evaluation process identified in §50.9 of this chapter. In the appeal, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application. If the appeal relates to the amount of housing tax credits recommended to be allocated, the Department will provide the Applicant with the underwriting report upon request.

(4) The Executive Director of the Department shall respond in writing to the appeal not later than the 14th day after the date of receipt of the appeal. If the Applicant is not satisfied with the Executive Director's response to the appeal, the Applicant may appeal directly in writing to the Board, provided that an appeal filed with the Board under this subsection must be received by the Board before:

(A) The seventh day preceding the date of the Board meeting at which the relevant commitment decision is expected to be made; or

(B) The third day preceding the date of the Board meeting described by subparagraph (A) of this paragraph, if the Executive Director does not respond to the appeal before the date described by subparagraph (A) of this paragraph.

(5) Board review of an appeal under paragraph (4) of this subsection is based on the original Application and additional documentation filed with the original Application. The Board may not review any information not contained in or filed with the original Application. The decision of the Board regarding the appeal is final.

(6) The Department will post to its web site an appeal filed with the Department or Board and any other document relating to the processing of the appeal. (§2306.6717(a)(5))

(c) Provision of Information or Challenges Regarding Applications from Unrelated Entities to the Application. The Department will address information or challenges received from unrelated entities to a specific 2008 active Application, utilizing a preponderance of the evidence standard, as stated in paragraphs (1) - (3) of this subsection, provided the information or challenge includes a contact name, telephone number, fax number and e-mail address of the person providing the information or challenge and must be received by the Department no later than June 15, 2008:

(1) Within 14 business days of the receipt of the information or challenge, the Department will post all information and challenges received (including any identifying information) to the Department's website.

(2) Within seven business days of the receipt of the information or challenge, the Department will notify the Applicant related

to the information or challenge. The Applicant will then have seven business days to respond to all information and challenges provided to the Department.

(3) Within 14 business days of the receipt of the response from the Applicant, the Department will evaluate all information submitted and other relevant documentation related to the investigation. This information may include information requested by the Department relating to this evaluation. The Department will post its determination summary to its website. Any determinations made by the Department cannot be appealed by any party unrelated to the Applicant.

(d) Amendment of Application Subsequent to Allocation by Board. (§2306.6712 and §2306.6717(a)(4))

(1) If a proposed modification would materially alter a Development approved for an allocation of a housing tax credit, or if the Applicant has altered any selection criteria item for which it received points, the Department shall require the Applicant to file a formal, written request for an amendment to the Application.

(2) The Executive Director of the Department shall require the Department staff assigned to underwrite Applications to evaluate the amendment and provide an analysis and written recommendation to the Board. The appropriate party monitoring compliance during construction in accordance with §50.18 of this chapter shall also provide to the Board an analysis and written recommendation regarding the amendment. For amendments which require Board approval, the amendment request must be received by the Department at least 30 days prior to the Board meeting where the amendment will be considered.

(3) The Board must vote on whether to approve an amendment. The Board by vote may reject an amendment and, if appropriate, rescind a Commitment Notice or terminate the allocation of housing tax credits and reallocate the credits to other Applicants on the Waiting List if the Board determines that the modification proposed in the amendment:

(A) would materially alter the Development in a negative manner; or

(B) would have adversely affected the selection of the Application in the Application Round.

(4) Material alteration of a Development includes, but is not limited to:

(A) a significant modification of the site plan;

(B) a modification of the number of units or bedroom mix of units;

(C) a substantive modification of the scope of tenant services;

(D) a reduction of three percent or more in the square footage of the units or common areas;

(E) a significant modification of the architectural design of the Development;

(F) a modification of the residential density of the Development of at least five percent;

(G) an increase or decrease in the site acreage of greater than 10% from the original site under control and proposed in the Application; and

(H) any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, the Department staff shall consider whether the need for the modification proposed in the amendment was:

(A) Reasonably foreseeable by the Applicant at the time the Application was submitted; or

(B) Preventable by the Applicant.

(6) This section shall be administered in a manner that is consistent with the Code, §42.

(7) Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and monitor regarding the amendment will be posted to the Department's web site.

(8) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants targeted in the Real Estate Analysis Report at the time of the Commitment Notice issuance, as approved by the Board, the following procedure will apply. For amendments that involve a reduction in the total number of low-income Units being served, or a reduction in the number of low-income Units at any level of AMGI, as approved by the Board, evidence must be presented to the Department that includes written confirmation from the lender and syndicator that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request, however, any affirmative recommendation to the Board is contingent upon concurrence from the Real Estate Analysis Division that the Unit adjustment (or an alternative Unit adjustment) is necessary for the continued feasibility of the Development. Additionally, if it is determined by the Department that the allocation of credits would not have been made in the year of allocation because the loss of low-income targeting points would have resulted in the Application not receiving an allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for 24 months from the time that the amendment is approved.

(e) Housing Tax Credit and Ownership Transfers. (§2306.6713) A Development Owner may not transfer an allocation of housing tax credits or ownership of a Development supported with an allocation of housing tax credits to any Person other than an Affiliate of the Development Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer.

(1) Transfers will not be approved prior to the issuance of IRS Forms 8609 unless the Development Owner can provide evidence that a hardship is creating the need for the transfer (potential bankruptcy, removal by a partner, etc.). A Development Owner seeking Executive Director approval of a transfer and the proposed transferee must provide to the Department a copy of any applicable agreement between the parties to the transfer, including any third-party agreement with the Department.

(2) A Development Owner seeking Executive Director approval of a transfer must provide the Department with documentation requested by the Department, including but not limited to, a list of the names of transferees and Related Parties; and detailed information describing the experience and financial capacity of transferees and related parties. All transfer requests must disclose the reason for the request. The Development Owner shall certify to the Executive Director that

the tenants in the Development have been notified in writing of the transfer before the 30th day preceding the date of submission of the transfer request to the Department. Not later than the fifth working day after the date the Department receives all necessary information under this section, the Department shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the Housing Tax Credit Program, LURAs; and the sufficiency of the transferee's experience with Developments supported with Housing Credit Allocations. If the viable operation of the Development is deemed to be in jeopardy by the Department, the Department may authorize changes that were not contemplated in the Application.

(3) As it relates to the Credit Cap further described in §50.6(d) of this chapter, the credit cap will not be applied in the following circumstances:

(A) In cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(B) In cases where the general partner is being replaced if the award of credits was made at least five years prior to the transfer request date.

(f) Sale of Certain Tax Credit Properties. Consistent with §2306.6726, Texas Government Code, not later than two years before the expiration of the Compliance Period, a Development Owner who agreed to provide a right of first refusal under §2306.6725(b)(1), Texas Government Code and who intends to sell the property shall notify the Department of its intent to sell.

(1) The Development Owner shall notify Qualified Nonprofit Organizations and tenant organizations of the opportunity to purchase the Development. The Development Owner may:

(A) During the first six-month period after notifying the Department, negotiate or enter into a purchase agreement only with a Qualified Nonprofit Organization that is also a community housing development organization as defined by the Federal Home Investment Partnership Program (HOME);

(B) During the second six-month period after notifying the Department, negotiate or enter into a purchase agreement with any Qualified Nonprofit Organization or tenant organization; and

(C) During the year before the expiration of the compliance period, negotiate or enter into a purchase agreement with the Department or any Qualified Nonprofit Organization or tenant organization approved by the Department.

(2) Notwithstanding items for which points were received consistent with §50.9(i) of this chapter, a Development Owner may sell the Development to any purchaser after the expiration of the compliance period if a Qualified Nonprofit Organization or tenant organization does not offer to purchase the Development at the minimum price provided by §42(i)(7), Internal Revenue Code of 1986 (26 U.S.C. §42(i)(7)), and the Department declines to purchase the Development.

(g) Withdrawals. An Applicant may withdraw an Application prior to receiving a Commitment Notice, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation, and making any required statements as to the return of any tax credits allocated to the Development at issue.

(h) Cancellations. The Department may cancel a Commitment Notice, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Development if:

(1) The Applicant or the Development Owner, or the Development, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Applications process for the Development;

(2) Any statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Development's Application ineligible for funding pursuant to §50.5 of this chapter if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) The Applicant or the Development Owner or the Development, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

(i) Alternative Dispute Resolution Policy. In accordance with §2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and Applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at anytime an Applicant or other person would like to engage the Department in an ADR procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title.

§50.18. Compliance Monitoring and Material Noncompliance.

The Code, §42(m)(1)(B)(iii), requires the Department as the housing credit agency to include in its QAP a procedure that the Department will follow in monitoring Developments for compliance with the provisions of the Code, §42 and in notifying the IRS of any noncompliance of which the Department becomes aware. Detailed compliance rules and procedures for monitoring are set forth in Chapter 60 of this title.

§50.19. Department Records; Application Log; IRS Filings.

(a) Department Records. At all times during each calendar year the Department shall maintain a record of the following:

(1) The cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(2) The cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(3) The cumulative amount of Housing Credit Allocations made during such calendar year; and

(4) The remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) Application Log. (§2306.6702(a)(3) and §2306.6709) The Department shall maintain for each Application an Application Log that tracks the Application from the date of its submission. The Application Log will contain, at a minimum, the information identified in paragraphs (1) - (9) of this subsection.

(1) The names of the Applicant and all General Partners of the Development Owner, the owner contact name and phone number, and full contact information for all members of the Development Team;

(2) The name, physical location, and address of the Development, including the relevant Uniform State Service Region of the state;

(3) The number of Units and the amount of housing tax credits requested for allocation by the Department to the Applicant;

(4) Any Set-Aside category under which the Application is filed;

(5) The requested and awarded score of the Application in each scoring category adopted by the Department under the Qualified Allocation Plan;

(6) Any decision made by the Department or Board regarding the Application, including the Department's decision regarding whether to underwrite the Application and the Board's decision regarding whether to allocate housing tax credits to the Development;

(7) The names of individuals making the decisions described by paragraph (6) of this subsection, including the names of Department staff scoring and underwriting the Application, to be recorded next to the description of the applicable decision;

(8) The amount of housing tax credits allocated to the Development; and

(9) A dated record and summary of any contact between the Department staff, the Board, and the Applicant or any Related Parties.

(c) IRS Filings. The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes Housing Credit Allocations, a copy of each completed (as to Part I) IRS Form 8609, the original of which was mailed or delivered by the Department to a Development Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low-income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of the Carryover Allocation Agreement will be mailed or faxed to the Development Owner by the Department. The original of the Carryover Allocation Document will be retained by the Department and IRS Form 8610 Schedule A will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The Department shall be authorized to vary from the requirements of this section to the extent required to adapt to changes in IRS requirements.

§50.20. Program Fees; Refunds; Public Information Requests; Adjustments of Fees and Notification of Fees; Extensions; Penalties.

(a) Timely Payment of Fees. All fees must be paid as stated in this section, unless the Executive Director has granted a waiver for specific extenuating and extraordinary circumstances. To be eligible for a waiver, the Applicant must submit a request for a waiver no later than 10 business days prior to the deadlines as stated in this section. Any fees, as further described in this section, that are not timely paid will cause an Applicant to be ineligible to apply for tax credits and additional tax credits and ineligible to submit extension requests, ownership changes and Application amendments. Payments made by check, for which insufficient funds are available, may cause the Application, commitment or allocation to be terminated.

(b) Pre-Application Fee. Each Applicant that submits a Pre-Application shall submit to the Department, along with such Pre-Application, a non refundable Pre-Application fee, in the amount of $10 per Unit. Units for the calculation of the Pre-Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Pre-Applications without the specified Pre-Application Fee in the form of a check will not be accepted. Pre-Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the managing General Partner of the Development Owner, or Control the managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Pre-Application fee. (General Appropriation Act, Article VII, Rider 7; §2306.6716(d))For Tax Exempt Bond Developments with the Department as the issuer, the Applicant shall submit the following fees: $1,000 (payable to TDHCA), $1,500 (payable to Vincent & Elkins, Bond Counsel), and $5,000 (payable to the Texas Bond Review Board).

(c) Application Fee. Each Applicant that submits an Application shall submit to the Department, along with such Application, an Application fee. For Applicants having submitted a Pre-Application which met Pre-Application Threshold and for which a Pre-Application fee was paid, the Application fee will be $20 per Unit. For Applicants not having submitted a Pre-Application, the Application fee will be $30 per Unit. Units for the calculation of the Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Applications without the specified Application Fee in the form of a check will not be accepted. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as he managing General Partner of the Development Owner, or Control the managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Application fee. (General Appropriation Act, Article VII, Rider 7; §2306.6716(d)) For Tax Exempt Bond developments with the Department as the Issuer the Applicant shall submit a tax credit application fee of $30 per unit and bond application fee of $10,000. Those applications utilizing a local issuer only need to submit the tax credit application fee.

(d) Refunds of Pre-Application or Application Fees. (§2306.6716(c)) Upon written request from the Applicant, the Department shall refund the balance of any fees collected for a Pre-Application or Application that is withdrawn by the Applicant or that is not fully processed by the Department. The amount of refund on Pre-Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 50% of the review, and Threshold review prior to a deficiency issued will constitute 30% of the review. Deficiencies submitted and reviewed constitute 20% of the review. The amount of refund on Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 20% of the review, the site visit will constitute 20% of the review, Eligibility and Selection review will constitute 20%, and Threshold review will constitute 20% of the review, and underwriting review will constitute 20%. The Department must provide the refund to the Applicant not later than the 30th day after the date of request.

(e) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation of a Development by an independent external underwriter in accordance with §50.9(d)(6), (e)(3), and (f)(6) of this chapter if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the commitment fee established in subsection (f) of this section, in the event that a Commitment Notice or Determination Notice is issued by the Department to the Development Owner.

(f) Commitment or Determination Notice Fee. Each Development Owner that receives a Commitment Notice or Determination Notice shall submit to the Department, not later than the expiration date on the Commitment or Determination notice, a non-refundable commit-

ment fee equal to 5% of the annual Housing Credit Allocation amount. The commitment fee shall be paid by check. If a Development Owner of an Application awarded Competitive Housing Tax Credits has paid a Commitment Fee and returns the credits by November 1, 2008, the Development Owner will receive a refund of 50% of the Commitment Fee.

(g) Compliance Monitoring Fee. Upon receipt of the cost certification, the Department will invoice the Development Owner for compliance monitoring fees. The amount due will equal $40 per tax credit unit. The fee will be collected, retroactively if applicable, beginning with the first year of the credit period. The invoice must be paid prior to the issuance of form 8609. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service.

(h) Building Inspection Fee. The Building Inspection Fee must be paid at the time the Commitment Fee is paid. The Building Inspection Fee for all Developments is $750. Inspection fees in excess of $750 may be charged to the Development Owner not to exceed an additional $250 per Development.

(i) Tax-Exempt Bond Credit Increase Request Fee. As further described in §50.12 of this chapter, requests for increases to the credit amounts to be issued on IRS Forms 8609 for Tax-Exempt Bond Developments must be submitted with a request fee equal to five percent of the amount of the credit increase for one year.

(j) Public Information Requests. Public information requests are processed by the Department in accordance with the provisions of the Government Code, Chapter 552. The Department uses the guidelines promulgated by the Texas Facilities Commission to determine the cost of copying, and other costs of production.

(k) Periodic Adjustment of Fees by the Department and Notification of Fees. (§2306.6716(b)) All fees charged by the Department in the administration of the tax credit program will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. The Department shall publish each year an updated schedule of Application fees that specifies the amount to be charged at each stage of the Application process. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

(l) Extension and Amendment Requests. All extension requests relating to the Commitment Notice, Carryover, Documentation for 10% Test, Substantial Construction Commencement, Placed in Service or Cost Certification requirements and amendment requests shall be submitted to the Department in writing and be accompanied by a mandatory non-refundable extension fee in the form of a check in the amount of $2,500. Such requests must be submitted to the Department no later than the date for which an extension is being requested. All requests for extensions totaling less than 6 months may be approved by the Executive Director and are not required to have Board approval. For extensions that require Board approval, the extension request must be received by the Department at least 15 business days prior to the Board meeting where the extension will be considered. The extension request shall specify a requested extension date and the reason why such an extension is required. Carryover extension requests shall not request an extended deadline later than December 1st of the year the Commitment Notice was issued. The Department, in its sole discretion, may consider and grant such extension requests for all items. If an extension is required at Cost Certification, the fee of $2,500 must be received by the Department to qualify for issuance of Forms 8609. Amendment requests must be submitted consistent with §50.17(d) of this chapter. The Board may waive related fees for good cause.

(m) Penalties. Development Owners who have more tax credits allocated to them than they can substantiate through Cost Certification will return those excess tax credits prior to issuance of 8609's. For Competitive Housing Tax Credit Developments, a penalty fee equal to the one year credit amount of the lost credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of form 8609's if the tax credits are not returned, and 8609's issued, within 180 days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with §42, Internal Revenue Code.

§50.21. Manner and Place of Filing All Required Documentation.

(a) All Applications, letters, documents, or other papers filed with the Department must be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(b) All notices, information, correspondence and other communications under this chapter shall be deemed to be duly given if delivered or sent and effective in accordance with this subsection. Such correspondence must reference that the subject matter is pursuant to the Tax Credit Program and must be addressed to the Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941 or for hand delivery or courier to 221 East 11th Street, Austin, Texas 78701 or more current address of the Department as released on the Department's website. Every such correspondence required or contemplated by this chapter to be given, delivered or sent by any party may be delivered in person or may be sent by courier, telecopy, express mail, telex, telegraph or postage prepaid certified or registered air mail (or its equivalent under the laws of the country where mailed), addressed to the party for whom it is intended, at the address specified in this subsection. Regardless of method of delivery, documents must be received by the Department no later than 5:00 p.m. for the given deadline date. Notice by courier, express mail, certified mail, or registered mail will be considered received on the date it is officially recorded as delivered by return receipt or equivalent. Notice by telex or telegraph will be deemed given at the time it is recorded by the carrier in the ordinary course of business as having been delivered, but in any event not later than one business day after dispatch. Notice not given in writing will be effective only if acknowledged in writing by a duly authorized officer of the Department.

(c) If required by the Department, Development Owners must comply with all requirements to use the Department's web site to provide necessary data to the Department.

§50.22. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules if the Board finds that waiver is appropriate to fulfill the purposes or policies of Chapter 2306, Texas Government Code, or for other good cause, as determined by the Board.

(b) Section 1.13 of this title may be waived for any person seeking any action by filing a request with the Board.

(c) The Department may amend this chapter and the Rules contained herein at any time in accordance with the Government Code, Chapter 2001.

§50.23. Deadlines for Allocation of Housing Tax Credits (§2306.6724).

(a) Not later than September 30 of each year, the Department shall prepare and submit to the Board for adoption the draft QAP required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the Housing Tax Credit program.

(b) The Board shall adopt and submit to the Governor the QAP not later than November 15 of each year.

(c) The Governor shall approve, reject, or modify and approve the QAP not later than December 1 of each year. (§2306.67022)(§42(m)(1))

(d) The Board shall annually adopt a manual, corresponding to the QAP, to provide information on how to apply for housing tax credits.

(e) Applications for Housing Tax Credits to be issued a Commitment Notice during the Application Round in a calendar year must be submitted to the Department not later than March 1.

(f) The Board shall review the recommendations of Department staff regarding Applications and shall issue a list of approved Applications each year in accordance with the Qualified Allocation Plan not later than June 30.

(g) The Board shall approve final commitments for allocations of housing tax credits each year in accordance with the Qualified Allocation Plan not later than July 31, unless unforeseen circumstances prohibit action by that date. In any event, the Board shall approve final commitments for allocations of housing tax credits each year in accordance with the Qualified Allocation Plan not later than September 30. Department staff will subsequently issue Commitment Notices based on the Board's approval. Final commitments may be conditioned on various factors approved by the Board, including resolution of contested matters in litigation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703905
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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CHAPTER 51. HOUSING TRUST FUND RULES

10 TAC §§51.1 - 51.11

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs (Department) proposes the repeal of §§51.1 - 51.11, concerning the Housing Trust Fund Rules. These repeals are proposed in order to allow public comment and adoption of new rules governing the Housing Trust Fund, to coordinate the adoption of new Housing Trust Fund rules with new rules being adopted as part of the 2008 rule cycle and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Mr. Michael Gerber, Executive Director, has determined that, for the first five-year period the proposed repeals are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

Mr. Gerber has also determined that, for each year of the first five years the proposed repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules to enhance the State's ability to provide decent, safe, and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on these proposed repeals. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The repeals are proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§51.1. Purpose.
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§51.11. Waiver.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703866
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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10 TAC §§51.1 - 51.17

The Texas Department of Housing and Community Affairs (the Department) proposes new Chapter 51, §§51.1 - 51.17, concerning the Housing Trust Fund Rules. The new chapter is proposed in order to allow public comment on and adoption of new rules governing the Housing Trust Fund, to coordinate the adoption of new Housing Trust Fund rules with new rules

being adopted as part of the 2008 rule cycle and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Mr. Gerber has also determined that for each year of the first five-years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be the enhancement of the State's ability to provide decent, safe and sanitary housing administered by the Department. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on these new sections. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the proposed new sections.

§51.1. Purpose.

This Chapter clarifies the use and administration of the Housing Trust Fund. The Department shall use the Housing Trust Fund to provide loans, grants, or other comparable forms of assistance to local units of government, public housing authorities, for profit entities, nonprofit organizations, income-eligible individuals, families, and households to finance, acquire, rehabilitate, and develop decent, safe, and sanitary housing. The fund is created pursuant to §2306.201, Texas Government Code. The use of the Housing Trust Fund is limited to activities pursuant to §2306.202, Texas Government Code:

(1) assistance for individuals and families of low and very low income;

(2) technical assistance and capacity building to nonprofit organizations engaged in developing housing for individuals and families of low and very low income;

(3) security for repayment of revenue bonds issued to finance housing for individuals and families of low and very low income; and

(4) subject to the limitations in §2306.251, Texas Government Code, the Department may also use the fund to acquire property to endow the fund.

§51.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Administrative Deficiencies--The absence of information or a document from the application as required in this rule or applicable NOFA.

(2) Administrator--The Person responsible for performing under a Contract with the Department.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with an ownership interest.

(4) Affiliated Party--A Person in a relationship with the Administrator on a Contract with the Department.

(5) Applicant--A person who has submitted an Application for Department funds or other assistance.

(6) Application--A request for funds submitted to the Department in a form prescribed by the Department, including any exhibits or other supporting material.

(7) Application Acceptance Period--The period of time that Applications may be submitted to the Department as more fully described in the applicable NOFA.

(8) Application Submission Procedures Manual ("ASPM")--The manual which sets forth the procedures, forms and instructions for the completion and submission of an Application to the Department.

(9) Area Median Family Income ("AMFI")--The income estimated and determined by HUD as the median family income with adjustments for family size and geographic locations.

(10) Articles of Incorporation--The document that sets forth the basic terms for a corporation's existence and is the official recognition of the corporation's existence.

(11) Board--The governing board of the Texas Department of Housing and Community Affairs.

(12) Capacity Building--Educational and organizational support assistance to promote the ability of community housing development organizations and nonprofit organizations to maintain, rehabilitate and construct housing for low, very low, and extremely low-income persons and families. This activity may include:

(A) organizational support to cover expenses for housing development or management related training, technical and other assistance to the board of directors, staff, and members of the nonprofit organizations or community housing development organizations;

(B) technical assistance and training related to housing development, housing management, or other subjects related to the provision of housing or housing services; or

(C) studies and analyses of housing needs.

(13) Chapter 2306--The enabling statute for the Department found in Texas Government Code, Chapter 2306.

(14) Colonia--A geographic area that is located in a county some part of which is within 150 miles of the international border of this state that consists of 11 or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that:

(A) has a majority population composed of individuals and families of low income and very low income, based on the federal Office of Management and Budget poverty index, and meets the

qualifications of an economically distressed area under §17.921, Water Code; or

(B) has the physical and economic characteristics of a colonia, as determined by the Texas Water Development Board.

(15) Colonia Housing Standards--The Department's HUD approved housing standards that allows Colonia residents with the opportunity to rehabilitate their homes when located in a designated Colonia.

(16) Competitive Application Cycle--A defined period of time that Applications may be submitted according to a published Notice of Funding Availability (NOFA). Applications will be reviewed in accordance with the rules for application review published in the NOFA, and the ASPM.

(17) Control--The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership or voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing General Partner of a limited liability company.

(18) Contract--The executed written agreement between the Department and an Administrator performing an activity related to a program that outlines performance requirements and responsibilities assigned by the document.

(19) Deobligated Funds--The funds released by an Administrator or Contractor or recovered by the Department canceling a contract or award involving some or all of a contractual financial obligation between the Department and an Administrator or contractor.

(20) Department--The Texas Department of Housing and Community Affairs.

(21) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(22) Development--A Project that has a construction component, either in the form of new construction or the rehabilitation of multi-unit or single family residential housing that meet the affordability requirements.

(23) Development Funding--

(A) a loan or grant; or

(B) an in-kind contribution, including a donation of real property, a fee waiver for a building permit or for water or sewer service, or a similar contribution that:

(i) provides an economic benefit; and

(ii) results in a quantifiable cost reduction for the applicable development.

(24) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract approved by the Department.

(25) Development Site--The area, or if scattered site areas, for which the Development is proposed to be located and is to be under the Development Owner's Control.

(26) Executive Award and Review Advisory Committee ("The Committee")--The Department committee that will develop funding priorities and make funding and allocation recommendations to the Board based upon the evaluation of an Application in accordance with the housing priorities as set forth in Chapter 2306, Texas Government Code, and as set forth herein, and the ability of an Applicant to meet those priorities.

(27) General Contractor--One who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors.

(28) General Partner--The partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(29) Grant--Financial assistance that is awarded in the form of money to a housing sponsor for a specific purpose and that is not required to be repaid. For purposes of this chapter, a Grant includes a forgivable loan.

(30) Household--One or more persons occupying a housing unit.

(31) Housing Development Costs--The total of all costs incurred, or to be incurred, by the Development Owner in acquiring, constructing, rehabilitating and financing a Development as determined by the Department based on the information contained in the Application. Such costs include reserves and any expenses attributable to commercial areas.

(32) HUD--The United States Department of Housing and Urban Development, or its successor.

(33) Intergenerational Housing--Housing that includes specific units that are restricted to the age requirements of a Qualified Elderly Development and specific units that are not age restricted in the same Development that:

(A) have separate and specific buildings exclusively for the age restricted units;

(B) have separate and specific leasing offices and leasing personnel exclusively for the age restricted units;

(C) have separate and specific entrances, and other appropriate security measures for the age restricted units;

(D) provide shared social service programs that encourage intergenerational activities but also provide separate amenities for each age group;

(E) share the same Development site;

(F) are developed and financed under a common plan and owned by the same Person for federal tax purposes; and

(G) meet the requirements of the federal Fair Housing Act.

(34) Income Eligible Households--

(A) Low-Income Households--Households whose annual incomes do not exceed 80% of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size.

(B) Very Low-Income Households--Households whose annual incomes do not exceed 60% of the median family income for

the area, as determined by HUD and published by the Department, with adjustments for family size.

(C) Extremely Low Income Households--Households whose annual incomes do not exceed 30% of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size.

(35) Land Use Restriction Agreement ("LURA")--A Land Use Restriction Agreement that has been executed by the Department and a Person related to a specific property or properties and filed with the responsible recording authority.

(36) Loan Agreement--An agreement between the Department and a Person regarding the terms and conditions of a loan provided to the Person from the Department.

(37) Material Noncompliance--As is defined in Title 10 Texas Administrative Code, Chapter 60, Subchapter A.

(38) Memorandum of Understanding (MOU)--A written agreement detailing the understanding between the parties.

(39) Mortgagor ("Borrower")--The Person who borrows money and uses his or her real property as collateral and security for the payment of the debt.

(40) New construction--Any Development not meeting the definition of Rehabilitation or Reconstruction.

(41) NOFA--Notice of Funding Availability, published in the *Texas Register.*

(42) Nonprofit Organization--A public or private organization that:

(A) is organized under state or local laws;

(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual;

(C) has a current tax exemption ruling from the Internal Revenue Service (IRS) under §501(c)(3), a charitable, nonprofit corporation, or §501(c)(4), a community or civic organization, of the Internal Revenue Code of 1986, as evidenced by a certificate from the IRS that is dated 1986 or later. The exemption ruling must be effective on the date of the application and must continue to be effective throughout the length of any contract agreements; or classification as a subordinate of a central organization non-profit under the Internal Revenue Code, as evidenced by a current group exemption letter, that is dated 1986 or later, from the IRS that includes the Applicant. The group exemption letter must specifically list the Applicant; and

(D) A private nonprofit organization's pending application for §501(c)(3) or (c)(4) status cannot be used to comply with the tax status requirement.

(43) Open Application Cycle--A defined period during which applications may be submitted according to a published NOFA and which will be reviewed on a first come-first served basis until all funds available are committed, or until the NOFA is closed.

(44) Person--Any individual, partnership, corporation, association, unit of government, community action agency, or public or private organization of any character.

(45) Persons with Disabilities--A Household composed of one or more persons, at least one of whom is an adult, who has a disability that is a physical or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such an impairment as defined in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. §15002).

(46) Person with Special Needs--Individuals or categories of individuals determined by the Department to have unmet housing needs:

(A) consistent with 42 USC §12701 et seq. and as provided in the Consolidated Plan and may include any households composed of one or more persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations and migrant farm workers.

(B) Housing Trust Funds may also be awarded through Persons legally responsible for caring for a Person with Special Needs, pursuant to §2306.511, Texas Government Code.

(47) Predevelopment Costs--Reimbursable costs related to a specific eligible housing project including:

(A) Predevelopment housing project costs that the Department determines to be customary and reasonable, including but not limited to consulting fees, architectural fees, engineering fees, engagement of a development team, site control, and title clearance;

(B) Pre-construction housing project costs that the Department determines to be customary and reasonable, including but not limited to, the costs of obtaining architectural plans and specifications, zoning approvals, engineering studies and legal fees; and

(C) Predevelopment costs do not include general operational or administrative costs.

(48) Principal--Any Person that does or will exercise Control over a partnership, corporation, limited liability company, trust or any other private entity. In the case of:

(A) Partnerships, Principals include all General Partners, Special Limited Partners and Principals with ownership interest;

(B) Corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a ten percent or more interest in the corporation; and

(C) Limited liability companies, Principals include all managing members, members having a ten percent or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(49) Project--A site or an entire building (including a manufactured housing unit), or two or more buildings, together with the site or sites on which the building or buildings are located, that are under common ownership, management, and financing.

(50) Property--The real estate and all improvements thereon which are the subject of the Application whether currently existing or proposed to be built thereon in connection with the Application.

(51) Public Housing Authority--A housing authority established under the Texas Local Government Code, Chapter 392.

(52) Received Date--The date and time at which an Application is actually received by the Department.

(53) Rehabilitation--The improvement or modification of an existing residential development through an alteration, addition, or enhancement. The term includes the demolition of an existing residential development and the reconstruction of any development units, but does not include the improvement or modification of an existing residential development for the purpose of an adaptive reuse of the development.

(54) Resolution--Formal action by a corporate board of directors or other corporate body authorizing a particular act, transaction, or appointment. Resolutions must be in writing and state the specific action that was approved and adopted, the date the action was approved and adopted, and the signature of Person or Persons authorized to sign resolutions. Resolutions must be approved and adopted in accordance with the corporate Bylaws.

(55) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an urban area; or

(C) in an area that is eligible for funding by the Texas Rural Development Office of the United States Department of Agriculture, other than an area that is located in a municipality with a population of more than 50,000.

(56) Rural Development--A development or proposed development that is located in a Rural Area, other than rural new construction Developments with more than 80 units.

(57) TAC--Texas Administrative Code.

(58) Third Party--A Person who is not:

(A) Applicant, General Partner, Developer, or General Contractor, or

(B) An Affiliate or a Related Party to the Applicant, General Partner, Developer or General Contractor, or

(C) Person(s) receiving any portion of the contractor fee or developer fee.

(59) Unit of General Local Government--A city, town, county, or other general purpose political subdivision of the State.

(60) Urban Area--The area that is located within the boundaries of a primary metropolitan statistical area other than an area described by §2306.004(28-a)(B), Texas Government Code, or eligible for funding as described by §2306.004(28-a)(C).

§51.3. Allocation of Housing Trust Funds.

(a) Pursuant to §2306.201, Texas Government Code, the Housing Trust Fund is a fund administered by the Department, and placed with the Texas Treasury Safekeeping Trust Company.

(b) Uses of the Housing Trust Fund will be limited to those defined by §2306.202, Texas Government Code.

(c) Each biennium the first $2.6 million available through the housing trust fund for loans, grants, or other comparable forms of assistance shall be set aside and made available exclusively for local units of government, public housing authorities, and nonprofit organizations. Any additional funds may also be made available to for-profit organizations so long as at least 45 percent of available funds in excess of the first $2.6 million shall be made available to nonprofit organizations. The remaining portion shall be competed for by nonprofit organizations, for-profit organizations, and other eligible entities, pursuant to §2306.202, Texas Government Code.

(d) Funds shall be allocated to achieve broad geographic dispersion by awarding funds in accordance with §2306.111(d) and (g), Texas Government Code.

(e) The Department shall require that Applicants target at least 50% of those units served by housing trust funds to individuals and families earning less than 60% of AMFI.

(f) Bond indenture requirements governing expenditure of bond proceeds deposited in the housing trust fund shall govern and prevail over all other allocation requirements established in this Section. However, the Department shall distribute these funds in accordance with the requirements of this Section to the extent possible.

(g) Housing Trust Funds may also be allocated to the Texas Bootstrap Loan Program and will be awarded in accordance with §2306.753, Texas Government Code.

§51.4. Basic Eligible Activities.

(a) Pursuant to §2306.202, Texas Government Code, the Department, through the housing finance division, shall use the housing trust fund to provide Loans, Grants, or other comparable forms of assistance to Units of General Local Government, Public Housing Authorities, for-profit entities, Nonprofit organizations, and Income-Eligible individuals, families, and Households to finance, acquire, Rehabilitate, and Develop decent, safe, and sanitary housing. In each biennium the first $2.6 million available through the housing trust fund for Loans, Grants, or other comparable forms of assistance shall be set aside and made available exclusively for Units of General Local Government, Public Housing Authorities, and Nonprofit organizations. Any additional funds may also be made available to for-profit organizations so long as at least forty-five percent (45%) of available funds in excess of the first $2.6 million shall be made available to Nonprofit organizations for the purpose of acquiring, Rehabilitating, and Developing decent, safe, and sanitary housing. The remaining portion shall be competed for by nonprofit organizations, for-profit organizations, and other eligible entities. Notwithstanding any other section of this chapter, but subject to the limitations in §2306.251(c), the Department may also use the fund to acquire property to endow the fund.

(b) Use of the fund is limited to providing:

(1) assistance for individuals and families of low and very low income;

(2) technical assistance and capacity building to nonprofit organizations engaged in developing housing for individuals and families of low and very low income; and

(3) security for repayment of revenue bonds issued to finance housing for individuals and families of low and very low income.

§51.5. Application Procedures and Requirements.

(a) Competitive and Open Application Cycles. The Department will declare within a NOFA whether the application cycle will be a competitive or open cycle.

(b) Ex Parte Communications

(1) During the period beginning on the date Applications are filed in response to a NOFA and ending on the date the Board makes a final decision with respect to the approval of any Application for that NOFA, a member of the Board may not communicate with the following persons:

(A) an Applicant or a Related Party, as defined by state law, including board rules, and federal law; and

(B) any Person who is:

(i) active in the construction, Rehabilitation, ownership, or Control of the proposed Project, including:

(ii) a General Partner or Contractor; and

(iii) a Principal or Affiliate of a General Partner or Contractor; or

(iv) employed as a consultant, lobbyist, or attorney by an Applicant or a Related Party.

(2) Subject to paragraph (1) of this subsection, during the period beginning on the Applications are filed in response to a NOFA and ending on the date the Board makes a final decision with respect to the approval of any Application for that NOFA, an employee of the Department may communicate about the Application with the following Persons:

(A) the Applicant or a Related Party, as defined by state law, including board rules, and federal law; and

(B) any Person who is:

(i) active in the construction, rehabilitation, ownership, or control of the proposed project including:

(ii) a General Partner or Contractor; and

(iii) a Principal or Affiliate of a General Partner or contractor; or

(iv) employed as a consultant, lobbyist or attorney by the Applicant or a Related Party.

(3) A communication under paragraph (2) of this subsection may be oral or in any written form, including electronic communication through the internet, and must satisfy the following conditions:

(A) the communication must be restricted to technical or administrative matters directly affecting the Application;

(B) the communication must occur or be received on the premises of the Department during established business hours; and

(C) a record of the communication must be maintained and included with the Application for purposes of Board review and must contain the following information:

(i) the date, time, and means of communication;

(ii) the names and position titles of the Persons involved in the communication and, if applicable, the Person's relationship to the Applicant;

(iii) the subject matter of the communication; and

(iv) a summary of any action taken as a result of the communication.

(4) Notwithstanding paragraphs (1), (2) or (3) of this subsection, a Board member or Department employee may communicate without restriction with a Person listed in paragraphs (1) or (2) of this subsection during any Board meeting or public hearing held with respect to the Application, but not during a recess or other nonrecord portion of the meeting or hearing.

(5) Paragraph (1) of this subsection does not prohibit the Board from participating in social events at which a Person with whom communications are prohibited may or will be present, provided that all matters related to Applications to be considered by the Board will not be discussed.

(c) Eligible Applicants. The following organizations or entities are eligible to apply for Program Activities:

(1) Nonprofit organizations;

(2) Units of General Local Government;

(3) for-profit entities and sole proprietors; and

(4) Public Housing Agencies.

(d) Ineligible Applications, Activities, and Restrictions. The following conditions will cause an Applicant, and any applications they have submitted, to be ineligible:

(1) The Applicant, Development Owner, or Developer is an Administrator of a previously funded Contract for which Housing Trust Funds have been partially or fully deobligated due to failure to meet contractual obligations during the 12 months prior to application submission date, unless the deobligation was voluntary and prior to the contract term expiration date;

(2) The Applicant, Development Owner, or Developer has failed to submit or is delinquent in a response to provide an explanation, evidence of corrective action or a payment of disallowed costs or fees as a result of a monitoring review.

(3) The Applicant, Development Owner, or Developer has failed to make timely payment or is delinquent on any loans or fee commitments made with the Department on the date of the Application submission;

(4) The Applicant, Development Owner, or Developer has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement of Non-procurement Programs or has otherwise been debarred by HUD or the Department;

(5) The Applicant, Development Owner, or Developer has violated the State's revolving door policy;

(6) The Applicant, Development Owner, or Developer has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen years preceding the Application deadline;

(7) The Applicant, Development Owner, or Developer at the time of Application submission is: subject to an enforcement or disciplinary action under state or federal securities law or by the NASD is subject to a federal tax lien; or is the subject of an enforcement proceeding with any governmental entity;

(8) The Applicant, Development Owner, or Developer has issues covered under 10 TAC §1.3;

(9) The submitted Application has an entire volume of the Application missing; has excessive omissions of documentation from the threshold Criteria or uniform Application documentation; or is so unclear, disjointed or incomplete that a thorough review can not reasonably be performed by the Department, as determined by the Department. If an Application is determined ineligible pursuant to this section, the Application will be terminated without being processed as an Administrative Deficiency. To the extent that a review was able to be performed, specific reasons for the Department's determination of ineligibility will be included in the termination letter to the Applicant;

(10) The Applicant, Development Owner, or Developer or anyone that has Controlling ownership interest in the Development Owner or Developer that is active in the ownership or Control of one or more other rent restricted rental housing properties in the state of Texas administered by the Department is in Material Noncompliance with the LURA;

(11) The Application is a joint venture Application for the same Program Activity to serve the same town, city, or county that is identified in the Application already submitted as a sole Application for the same Program Activity in the same town, city or county;

(12) Any Application that includes financial participation by a Person who, during the five-year period preceding the date of the bid or award, has been convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricanes Rita or Katrina or any other disaster occurring after September 25, 2005, or was assessed a federal civil or administrative penalty in relation to such a contract;

(13) Applications which propose the refinancing or rehabilitation of properties constructed within the past 5 years and previously funded by the Department are not eligible; or

(14) Displacement of Existing Affordable Housing. Housing Trust Funds shall not be utilized on a development that has the effect of permanently displacing low, very low, and extremely low income persons and families. Low-Income persons who may be temporarily displaced by the rehabilitation of affordable housing may be eligible for compensation of moving and relocation expenses. If a Housing Trust Fund recipient violates the dislocation provision of this paragraph, that recipient risks loss of Housing Trust Funds and the landlord/developer must pay the affected tenant's costs and all moving expenses.

(e) Noncompliance. Each Application will be reviewed for its compliance history by the Department, consistent with Chapter 60, Subchapter A of this title. Applications containing Persons found to be in Material Noncompliance or otherwise violating the compliance rules of the Department will be terminated.

(f) Application Form and Materials. The Department will develop and publish on its website an Application and ASPM that if completed would satisfy the requirements for requesting funds from the Department. The Department may limit the eligibility of Applications in the NOFA and ASPM.

(g) General Application Requirements. Applicants must submit an Application by the deadline date specified in the NOFA using the Application and ASPM forms required by the Department. All Applications must be received during business hours (8:00 a.m. to 5:00 p.m. Central Standard Time) on any business day. Completion and submission of the Application includes the entire Uniform Application and any other supplemental forms which may be required by the Department. (§2306.1111)

(h) Application Limitations. The Department reserves the right to reduce the amount requested in an Application based on activity or Project feasibility, underwriting analysis, or availability of funds.

§51.6. Multifamily Development Application Requirements.

(a) Rental Housing Development Site and Development Restrictions. Restrictions include all those items referred to in Chapter 2306, Texas Government Code and any additional items included in the NOFA for rental housing developments.

(b) Limitations on the Size of Developments. Developments involving new construction will be limited to 252 units. These maximum Unit limitations also apply to those Developments which involve a combination of rehabilitation and new construction. Developments that consist solely of acquisition/rehabilitation or rehabilitation only may exceed the maximum unit restrictions. The minimum number of units shall be 4 units.

§51.7. Multifamily Development Applicants Requesting Additional Funding from Other Housing Finance Programs.

(a) If an Application is submitted to the Department for a Development that requests funds from two separate housing finance programs, one of which includes the Housing Trust Fund, and only one of the housing finance programs is operated as a Competitive Application Cycle, then the Application will be handled in accordance with the competitive cycle guidelines for that program. If an Application is submitted for two separate housing finance programs where both programs are either open cycle, or competitive, one of which is Housing Trust Fund, the Application will be handled in accordance with the most restrictive program rules with the approval of the Department's Executive Director. Threshold and any other rental requirements will be noted in any NOFA released.

(b) Applicants who are seeking tax credits and are also seeking funds under this Chapter for the same Development must meet the requirements under the Qualified Allocation Plan for the year in which they are applying for the tax credits, and all of the requirements of this Chapter specifically waived by the Department.

(c) Public Notification. Applicants for Rental Development activities will be required to provide written notification to each of the following persons or entities 14 days prior to the submission of any application package. Failure to provide written notifications 14 days prior to the submission of an application package at a minimum will cause an application to lose its "received by date" under open application cycles, or be terminated under competitive application cycles. Applicants must provide notifications to:

(1) the executive officer and elected members of the governing board of the community where the development will be located. This includes municipal governing boards, city councils, and County governing boards;

(2) all neighborhood organizations whose defined boundaries include the location of the Development;

(3) executive officer and Board President of the school district that covers the location of the Development;

(4) residents of occupied housing units that may be rehabilitated, reconstructed or demolished;

(5) the State Representative and State Senator whose district covers the location of the Development; and

(6) The notification letter must include, but not be limited to, the address of the development site, the number of units to be built or rehabilitated, the proposed rent and income levels to be served, and all other details required of the NOFA and Application Manual.

§51.8. Application Procedure and Requirements.

(a) Applications received by the Department in response to an Open Application Cycle NOFA will be handled in the following manner:

(1) The Department will accept Applications on an ongoing basis, until such date when the Department makes notice to the public that an Open Application Cycle has been closed.

(2) Each application will be handled on a first-come, first-served basis as further described in this section. Each application will be assigned a Received Date based on the date and time it is physically received by the Department. Then each application will be reviewed on its own merits in two review phases, as applicable. Applications will continue to be prioritized for funding based on its Received Date unless it does not proceed into the next phase(s) of review. Applications proceeding in a timely fashion through a phase will take priority over Applications that may have an earlier Received Date but that did not timely complete a phase of review.

(A) Phase One will begin as of the Received Date and will include a review of eligibility and threshold criteria and all Application requirements. The Department will ensure review of materials

required under the NOFA and ASPM and will issue a notice of any Administrative Deficiencies for threshold criteria. Applicants who are able to resolve their Administrative Deficiencies within five (5) business days will be forwarded into Phase Two, if applicable, and will continue to be prioritized by their Received Date. Applications with Administrative Deficiencies not cured within five (5) business days, will be terminated and must reapply for consideration of funds. Applications that have completed this Phase and do not require additional review in Phase Two, will be reviewed for recommendation to the Board by the Committee.

(B) Phase Two will include a comprehensive review for financial feasibility for Development Activities. Financial feasibility reviews will be conducted by the Real Estate Analysis (REA) Division consistent with §1.32 of this title. REA will create an underwriting report identifying staff's recommended Loan terms, the Loan or Grant amount and any conditions to be placed on the Development. The Department may issue a notice of any Administrative Deficiencies. Applications with Administrative Deficiencies not satisfied within five (5) business days, will be terminated and must reapply for consideration of funds. Applications that have completed this Phase will be reviewed for recommendation to the Board by the Committee.

(3) Because applications are processed in the order they are received by the Department it is possible that the Department will expend all available Housing Trust Fund funds before an application has completed all phases of review. In the case that all Housing Trust Fund funds are committed before an application has completed all phases of the review process, the Department will notify the applicant that their application will remain active for ninety (90) days in its current phase. If new Housing Trust Fund funds become available, Applications will continue onward with their review without losing their Received Date priority. If Housing Trust Fund funds do not become available within ninety (90) days of the notification, the Applicant will be notified that their Application is no longer under consideration. The applicant must reapply to be considered for future funding. If on the date an Application is received by the Department, no funds are available under the NOFA, the applicant will be notified that no funds remain under the NOFA and that the application will not be processed.

(b) Applications received by the Department in response to a Competitive Application Cycle NOFA for housing development activities will be handled in the following manner:

(1) The Department will accept Applications on an ongoing basis during the Application Acceptance Period as specified in the NOFA.

(2) Applications submitted and accepted by the Department will be reviewed for eligibility, threshold and selection criteria and all Application requirements. The Department will ensure review of materials required under the NOFA and ASPM. A comprehensive review of financial feasibility for Development activities will be conducted by the Real Estate Analysis (REA) Division consistent with §1.32 of this title for all competitive applications. REA will create an underwriting report identifying staff's recommended Loan terms, the Loan or Grant amount and any conditions to be placed on the Development. The Department will issue a notice of any Administrative Deficiencies for items reviewed. If Administrative Deficiencies are not cured to the satisfaction of the Department within five (5) business days of the deficiency notice date, then five (5) points shall be deducted from the selection score for each additional day the Administrative Deficiency remains unresolved. If Administrative Deficiencies are not clarified or corrected within seven (7) business days from the deficiency notice date, then the Application shall be terminated.

(3) Upon completion of review and no unresolved Administrative Deficiencies, the Application will be reviewed for recommendation to the Board by the Committee.

(c) Administrative Deficiencies. If an application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies including threshold and/or selection criteria documentation and/or financial feasibility analysis. The Department staff may request clarification or correction in a deficiency notice in the form of a facsimile and a telephone call to the Applicant advising that such a request has been transmitted. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. An Applicant may not change or supplement any part of an Application in any manner after submission to the Department, increase their award amount, or revise their unit mix (both income levels and bedroom mixes), except in response to a direct request from the Real Estate Analysis Division to remedy an Administrative Deficiency as further described in this title or by amendment of an Application after a commitment or allocation of Housing Trust Fund monies.

(d) The Department may decline to fund any Application if the proposed activities do not, in the Department's sole determination, represent a prudent use of the Department's funds. The Department is not obligated to proceed with any action pertaining to any Applications which are received, and may decide it is in the Department's best interest to refrain from pursuing any selection process. The Department reserves the right to negotiate individual elements of any Application.

(e) A site visit will be conducted. Applicants must receive recommendation for approval from the Department to be considered for funding by the Board.

(f) Applicants may appeal staff's decisions regarding their applications consistent with §1.7 of this title.

(g) Alternative Dispute Resolution Policy. Applicant's may utilize the Department's Alternative Dispute Resolution process as defined by §1.17 of this title.

§51.9. Criteria for Funding.

(a) In considering applications for funding, the Department considers the following requirements under §2306.203, Texas Government Code, and such others as may be enumerated during the funding cycle:

(1) Minimum Eligibility Criteria. To be considered for funding, an Applicant must first demonstrate that it meets each of the following threshold criteria:

(A) the Application is consistent with the requirements established in this rule and the NOFA;

(B) the Applicant provides evidence of its ability to carry out the proposal in the areas of financing, acquiring, Rehabilitating, Developing or managing an affordable housing Development;

(C) the proposal addresses and identifies a housing need. This assessment will be based on statistical data, surveys and other indicators of need as appropriate; and

(D) any outstanding Housing Trust Fund Pre-Development loans for the same proposed Development Site must be paid in full at the time of Loan closing for the current requested funds.

(2) Evaluation Factors. Pursuant to §2306.203(c), Texas Government Code, the criteria used to evaluate applications, as more fully reflected in the NOFA, will include at a minimum the:

(A) leveraging of federal funds including the extent to which the project will leverage State funds with other resources, including federal resources, and private sector funds;

(B) cost-effectiveness of a proposed development; and

(C) extent to which individuals and families of very low income and extremely low income are served by the development.

(b) The Board has final approval on all recommendations for funding.

(c) Eligible Applicants that have been approved for funding and that require a material change in the project description must provide a written request for the material change to the Department prior to implementing the change.

(1) A material change may include, but is not limited to, the following:

(A) Change in project site;

(B) Change in the number of units or set asides; and

(C) An increase in funding that is not permitted under §51.14 of this chapter.

(2) Failure to comply with this subsection may result in the termination of funding to Applicant.

§51.10. Process for Awards During Competitive Application Cycle.

(a) Applicants applying in response to a Competitive Application Cycle will be ranked by highest score per Uniform State Service Region per Area Type unless otherwise specified in the NOFA.

(b) In event of a tie between two or more Applicants, the Department reserves the right to determine which Application will receive a recommendation for funding. This decision will be based on housing need factors and feasibility of the proposed Project identified in the Application. Tied Applicants may also receive a partial recommendation for funding.

(c) If sufficient qualified Applications are not received for a Uniform State Service Region or Area Type, the funds will be redirected to the next Uniform State Service Region that had a higher number of qualified Applicants unless otherwise specified in the NOFA.

(d) Applicants may also receive a partial recommendation for funding. A minimum award amount may be established to ensure feasibility.

(e) When the remainder of the allocation within a Uniform State Service Region is insufficient to completely fund the next ranked Application in the Uniform State Service Region, it is within the discretion of the Department to:

(1) fund the next ranked application for the partial amount, reducing the scope of the Application proportionally;

(2) make necessary adjustments to fully fund the Application; or

(3) transfer the remaining funds to other Uniform State Service Region.

(f) All recommendations for awards will be presented to the Committee before presentation to the Board. All Applications must comply with all applicable program requirements or regulations.

(g) Applications receiving a favorable staff recommendation are presented to the Board for approval, pending the availability of Housing Trust Fund funds.

(h) Applicants may appeal staff's decision regarding their Applications in accordance with §1.7 of this title.

(i) Even after Board approval of the award of any Housing Trust Fund funds, acquisition or construction activities will be conditional upon a completed Loan closing and any other conditions deemed necessary by the Department.

§51.11. Contract Required after Award.

Any activity funded under this program will be governed by a written Contract that identifies the terms and conditions related to the awarded funds. The Contract will not be effective until executed by all parties to the Contract. Any amendments must be in writing and are subject to the requirements of this Chapter.

§51.12. Documents Supporting Mortgage Loans.

(a) A mortgage loan shall be evidenced by a mortgage or deed of trust note or bond and by a mortgage that creates a lien on the housing development and on all real property that constitutes the site of or that relates to the housing development.

(b) A note or bond and a mortgage or deed of trust:

(1) must contain provisions satisfactory to the department;

(2) must be in a form satisfactory to the department; and

(3) may contain exculpatory provisions relieving the Borrower or its Principal from personal liability if the department agrees.

(c) For each loan made for the Development of multifamily housing with Housing Trust Fund funds provided to the State, the Department shall obtain a mortgagee's title policy in the amount of the loan. The Department may not designate a specific title insurance company to provide the mortgagee title policy or require the borrower to provide the policy from a specific title insurance company. The borrower shall select the title insurance company to close the loan and to provide the mortgagee title policy.

§51.13. Amendments.

(a) Amendment requests to be approved by the Executive Director are allowable under the following circumstances:

(1) Time extensions. The Executive Director may collectively provide up to one six month extension to the end date of any Contract. Any additional time extension granted by the Executive Director shall include a statement by the Executive Director relating to unusual and non foreseeable circumstances. If the extension is longer than six months and the Executive Director determines does not feel he can issue a statement related to unusual or non-foreseeable circumstances can be issued, it will be presented to the Governing Board for approval, approval with modifications, or denial of the requested extension.

(2) Increase in funds. In the case of a modification or amendment to the dollar amount of the award, such modification or amendment does not increase the dollar amount by more than 25% of the original award or $50,000, whichever is greater. Modifications and/or amendments that increase the dollar amount by more than 25% of the original award or $50,000, whichever is greater; or significantly decrease the benefits to be received by the Department, in the estimation of the Executive Director, will be presented to the Board for approval.

(b) If the Administrator or Development Owner fails to meet the contract milestones or Contract term requirements and does not seek, or is not granted, a Contract amendment for an extension of a milestone or the entire term, the awarded funds related to the lack of performance may be entirely or partially deobligated at the Department's sole discretion.

(c) Additional Funds. In the event the Department receives additional funds, the Department, with Board approval, may elect to distribute funds to other Administrators or Development Owners.

(d) Accounting Requirements. Within 60 days following the conclusion of a contract issued by the Department the recipient shall provide a full accounting of funds expended under the terms of the contract. Failure of a recipient to provide full accounting of funds expended under the terms of a contract shall be sufficient reason to terminate the contract and for the Department to deny any future contract to the recipient.

(e) Individual Milestones. Each milestone is an individual term and subject to the amendment processes. An interim milestone extension may or may not extend the entire contract at the Department's discretion.

§51.14. Other Program Requirements.

(a) Employment opportunities. In connection with the planning and carrying out of any project assisted under the Act, to the greatest extent feasible, opportunities for training and employment shall be given to low, very low, and extremely low-income persons who meet position requirements residing within the area in which the project is located.

(b) Conflict of Interest.

(1) Conflict Prohibited. No person described in paragraph (2) of this subsection who exercises or has exercised any functions or responsibilities with respect to Housing Trust Fund activities under the Statute or who is in a position to participate in a decision making process or gain inside information with regard to such activities, may obtain a personal or financial interest or benefit from a Housing Trust Fund assisted activity, or have an interest in any Housing Trust Fund contract, subcontract or agreement or the proceeds hereunder, either for themselves or those with whom they have family or business ties, during their tenure or for one year thereafter.

(2) Persons Covered. The conflict of interest provisions of paragraph (1) of this subsection apply to any person who is an employee, agent, consultant, officer, elected official or appointed official of the Administrator or Development Owner.

(c) Right to Inspect and Monitor.

(1) The Department may, at any time, inspect and monitor the records and the work of the Project so as to ascertain the level of Project completion, quality of work performed, inventory levels of stored material, compliance with the approval plans and specifications, property standards, and program rules and requirements.

(2) Any unsatisfactory findings in the inspection may result in a reduction in the amount of funds requested or termination of funding.

(3) Within 45 days of completion of any construction, and before the release of any retainage funds, Administrators and Development Owners are required to notify the Department of the completion by submitting a certificate of completion and any other documents required by program guidelines, including, but not limited to, the following:

(A) Architect's Certification of Substantial Compliance;

(B) Administrator or Development Owner's Certificate of Substantial Completion; and

(C) Administrator or Development Owner's and Supplier's Release of Lien and warrantee.

(4) The Department performs a final close-out visit and assists owners in preparing for long-term compliance requirements upon completion of project development.

(d) Compliance.

(1) Recipient must maintain compliance with each of its Contracts with the Department.

(2) Restrictions are stated and enforced through a regulatory agreement.

(3) These restrictions include, but are not limited to the following:

(A) Rent restrictions;

(B) Record keeping and reporting; and

(C) Income targeting of tenants.

(4) The Department monitors compliance with project restrictions and any other covenants by Recipient in any Housing Trust Fund agreement. An annual per unit compliance fee of $25.00 may be charged for this review.

(e) For funds being used for multifamily rental properties, the Recipient must establish a reserve account consistent with §2306.186, Texas Government Code, and as further described in §1.37 of this title.

(f) Accounting Requirements. Within 60 days following the conclusion of a contract issued by the Department the Recipient shall provide a full accounting of funds expended under the terms of the contract. Failure of a recipient to provide full accounting of funds expended under the terms of a contract shall be sufficient reason to terminate the contract and for the Department to deny any future contract to the recipient.

§51.15. Citizen Participation.

(a) The Department holds at least one public hearing annually, and additional public hearings prior to consideration of any proposed significant changes to these rules, to solicit comments from the public, eligible applicants, and Administrators and Development Owner on the Department's rules, guidelines, and procedures for the Housing Trust Fund.

(b) The Department considers the comments it receives at public hearings. The Board annually reviews the performance, administration, and implementation of the Housing Trust Fund in light of the comments it receives. The Board also reviews funding goals and set-asides relating to Allocation of Housing Trust Funds.

(c) Unless the request is made during a Competitive Application Cycle, Applications for Housing Trust Funds are public information and the Department shall afford the public an opportunity to comment on proposed housing applications prior to making awards.

(d) Complaints will be handled in accordance with the Department's complaint procedures of 10 TAC §1.2.

§51.16. Records to be Maintained.

(a) Administrator or Development Owners are required, at least on an annual basis, to submit to the Department information required under Chapter 1 of this title, which may include, but is not limited to:

(1) such information as may be necessary to determine whether a project is benefiting low, very low, and extremely low-income persons and families;

(2) the monthly rent or mortgage payment for each dwelling unit in each structure assisted;

(3) such information as may be necessary to determine whether Administrators and Development Owners has carried out their housing activities in accordance with the requirements and primary objectives of the Housing Trust Fund and implementing regulations;

(4) the size and income of the household for each unit occupied by a low, very low, or extremely low-income person or family;

(5) data on the extent to which each racial and ethnic group and households have applied for and benefited from any project or activity funded in whole or in part with funds made available under Texas Government Code Chapter 2306. This data shall be updated annually; and

(6) A final statement of accounting upon completion of the Project.

(b) Administrator or Development Owners shall maintain records pertinent to the tenant's files for a period of at least three years.

(c) Administrator or Development Owners shall maintain records pertinent to funding awards including but not limited to project costs and certification work papers for a period of at least five years.

(d) Administrator or Development Owners shall maintain records in an accessible location.

§51.17. Waiver.

The Board may, in its discretion, waive any one or more of the rules set forth in this chapter to accomplish its legislative mandates or for other compelling circumstances.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703867
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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CHAPTER 60. COMPLIANCE ADMINISTRATION

SUBCHAPTER A. COMPLIANCE MONITORING

10 TAC §§60.1 - 60.22

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs proposes the repeal of §§60.1 - 60.22, concerning Compliance Monitoring. The sections are proposed to be repealed in order to enact new sections that will conform to other Department rules that are also being revised in the 2008 rule cycle and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Michael Gerber, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Gerber has also determined that for each year of the first five-years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be the ability to adopt new compliance monitoring rules that coordinate and conform with other Department rules that are undergoing revision as part of the 2008 rule cycle. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on this repeal. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306 and the Internal Revenue Code of 1986, §42, as amended, which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this proposed repeal.

§60.1. Purpose.

§60.2. Definitions.

§60.3. Development Inspections.

§60.4. Monitoring During the Affordability Period.

§60.5. Compliance History.

§60.6. Section 8 Voucher Holders and Tenant Selection.

§60.7. Monitoring for Compliance.

§60.8. Recordkeeping.

§60.9. Reporting.

§60.10. Annual Owner's Compliance Report Certification and Review.

§60.11. Record Retention Provisions.

§60.12. Inspection Provision.

§60.13. Inspection Standard.

§60.14. Notices to Owner.

§60.15. Notice to the IRS (HTC Developments only).

§60.16. Notices to the Department.

§60.17. Utility Allowances.

§60.18. Material Noncompliance.

§60.19. Alternative Dispute Resolution Policy.

§60.20. Liability.

§60.21. Applicability to All Programs.

§60.22. Waiver.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703892
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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10 TAC §§60.101 - 60.126

The Texas Department of Housing and Community Affairs (the Department) proposes new §§60.101 - 60.126, concerning Compliance Monitoring. The new sections are proposed to ensure that the compliance monitoring rules conform to other Department rules that are being revised in the 2008 rule cycle and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering these new sections.

Mr. Gerber has also determined that for each year of the first five-years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be the ability to adopt new compliance monitoring rules that coordinate and conform with other Department rules that are undergoing revision as part of the 2008 rule cycle. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with these new sections as proposed.

Public hearings will be held across the state between September 24 and October 5 to receive public input on these rules. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The new sections are proposed pursuant to authority granted in the Texas Government Code, Chapter 2306 and the Internal Revenue Code of 1986, §42, as amended, and related Internal Revenue Service Regulations which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by these proposed new sections.

§60.101. Purpose and Overview.

(a) This rule satisfies the requirement of §42(m)(1)(B)(iii) Internal Revenue Code (Code) to provide a procedure that will be followed for monitoring for noncompliance with the provisions of the Code and to notify the Internal Revenue Service of such noncompliance. The Department monitors rental developments receiving assistance under:

(1) the Housing Tax Credit program (HTC);

(2) the HOME Investment Partnerships program (HOME);

(3) the Tax Exempt Bond program (BOND);

(4) the Housing Trust Fund program (HTF);

(5) the Community Development Block Grant Disaster Recovery Program (CDBG); and

(6) the Federal Deposit Insurance Corporation's Affordable Housing Program (AHP) (formerly the Resolution Trust Corporation's Affordable Housing Disposition Program).

(b) All properties monitored by the Department are subject to the Department's enforcement rules, found in Subchapter C of this chapter.

(c) Compliance monitoring begins with the commencement of construction and continues to the end of the long term Affordability Period. The Portfolio Management and Compliance Division (PMC) monitors to ensure owners comply with the program rules and regulations, Chapter 2306, Texas Government Code, the Land Use Restriction Agreement (LURA) requirements and conditions, and representations imposed by the Application or award of funds by the Department. These rules do not address forms and other records that may be required of Development Owners by the Internal Revenue Service (IRS) or other governmental entities more generally, whether for purposes of filing annual returns or supporting Development Owner tax positions during an IRS or other governmental audit.

§60.102. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affordability Period--The Affordability Period commences as specified in the Land Use Restriction Agreement (LURA), or federal regulation or commences on the first day of the Compliance Period as defined by §42(i)(1) of the Internal Revenue Code (IRC) and continues through the appropriate program's affordability requirements or termination of the LURA, whichever is later. The term of the Affordability Period shall be imposed by LURA or other deed restriction and may be terminated upon foreclosure. During this period the Department shall monitor to ensure compliance with programmatic rules, regulations, and Application representations.

(2) Application--An Application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material. (§2306.6702)

(3) Architect of Record--The architect licensed in the jurisdiction that the project is located in, who prepares, stamps and signs the construction documents, and is legally recorded as the architect for the project.

(4) Board--The governing Board of the Texas Department of Housing and Community Affairs.

(5) Code--The U.S. Internal Revenue Code of 1986, as amended from time-to-time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued by the United States Department of the Treasury or the Internal Revenue Service.

(6) Compliance Period--With respect to a Housing Tax Credit building, the period of 15 taxable years, beginning with the first year of the Credit Period, pursuant to the Code §42(i)(1).

(7) Continuously Occupied--The same household has resided in the Unit for at least 12 months.

(8) Credit Period--With respect to a Housing Tax Credit building, the period of 10 taxable years, beginning with the taxable year the building is placed in service or at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code §42(f)(1).

(9) Department--The Texas Department of Housing and Community Affairs, an official and public agency of the State of Texas pursuant to Chapter 2306, Texas Government Code.

(10) Development--A property or work or a project, building, structure, facility, or undertaking, whether existing, new construction, remodeling, improvement, or rehabilitation, that meets or is designed to meet minimum property standards required by the Department and that is financed under the provisions of Chapter 2306, Texas Government Code.

(11) Extended Use Period--With respect to a Housing Tax Credit building, the period beginning on the first day of the Compliance Period and ending the later of:

(A) the date specified in the Land Use Restriction Agreement, or

(B) the date which is 15 years after the close of the Compliance Period.

(12) Historically Underutilized Business (HUB)--Any entity defined as a historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(13) Housing Quality Standards--The property condition standards described in 24 Code of Federal Regulations §982.401.

(14) Housing Sponsor--Sometimes referred to as "Development Owner." An individual, joint venture, partnership, limited partnership, trust, firm, corporation, limited liability company, other form of business organization or cooperative that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a housing Development, subject to the regulatory powers of the Department and other terms and conditions.

(15) HTC Development--Sometimes referred to as "HTC Property." A Development using Housing Tax Credits allocated by the Department.

(16) HUD-regulated Building--The rents and utility allowances of the building are reviewed by HUD on an annual basis.

(17) Low Income Unit--A Unit that is intended for occupancy by an income eligible household, as defined by the Department or the Code.

(18) Land Use Restriction Agreement or LURA--An agreement between the Department and the Development Owner which is a binding covenant upon the Development Owner's successors in interest that encumbers the Development with respect to the requirements of Chapter 2306, Texas Government Code; the Code; and the requirements of the various programs administered or funded by the Department.

(19) Material Noncompliance--

(A) A Housing Tax Credit Development located within the state of Texas will be classified by the Department as being in Material Noncompliance status if the noncompliance score for such Development is equal to or exceeds a threshold of 30 points in accordance with the Material Noncompliance provisions, methodology, and point system of this title.

(B) Non HTC Developments monitored by the Department with 1 to 50 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 30 points. Non HTC Developments monitored by the Department with 51 to 200 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 50 points. Non HTC Developments monitored by the Department with 201 or more Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 80 points.

(C) For all programs, a Development will be in Material Noncompliance if the noncompliance is stated in §60.121 of this chapter to be Material Noncompliance.

(20) Non HTC Development--Sometimes referred to as Non HTC Property. Any Development not utilizing Housing Tax Credits.

(21) Substantial Construction--

(A) For new construction Developments, 80% of framing is completed and 10% of the construction contract amount for the Development is expended, adjusted for any change orders. Substantial Construction is documented by both the most recent Application and Certification for Payment (or equivalent) and a certification from the inspecting architect.

(B) The minimum activity necessary to meet the requirement of Commencement of Substantial Construction for rehabilitation Developments is defined as having completed 50% of the proposed scope of work and expended 10% of the construction budget as documented by the inspecting architect.

(22) Unit--Any residential rental Unit in a Development consisting of an accommodation, including a single room used as an accommodation on a non-transient basis that contains complete physical facilities and fixtures for living, sleeping, eating, cooking, and sanitation.

(23) Unit Type--Units will be considered different Unit Types if there is any variation in the number of bedroom, bathrooms or square footage. For example, a two bedroom one bath Unit is considered a different Unit Type than a two bedroom two bath Unit. A three bedroom two bath Unit with 1,000 square feet is considered a different Unit Type than a three bedroom two bath Unit with 1,200 square feet.

§60.103. Construction Monitoring.

(a) The Department will monitor the entire construction phase for all applicable requirements according to the level of risk. After final Construction during the affordability period, the department will periodically monitor the development to assure that the initial compliance review was correct.

(b) The Department will not provide any funding to any Development unless the owner certifies that the housing Development is, or will be upon completion of construction, in compliance with the following housing laws:

(1) state and federal fair housing laws, including Chapter 301, Property Code, the Texas Fair Housing Act, Title VIII of the Civil

Rights Act of 1968 (42 U.S.C. §3601, et seq.), and the Fair Housing Amendments of 1988 (42 U.S.C. §3601, et seq.);

(2) the Civil Rights Act of 1964 (42 U.S.C. §2000a, et seq.);

(3) the Americans with Disabilities Act of 1990 (42 U.S.C. §12101, et seq.); and

(4) §504, Rehabilitation Act of 1973 (29 U.S.C. §701, et seq.). (§2306.257)

(c) Evidence of Commencement of Substantial Construction must be submitted no later than the deadline established in the Development's Commitment Notice.

(d) Copies of any construction reports supplied to a syndicator must be supplied to the Department.

(e) Copies of any reports issued during construction that indicate changes that affect the representations made during the application process must be supplied to the Department.

(f) Owners are required to submit evidence of construction completion within thirty days of completion in a format prescribed by the Department. In addition, the Architect of Record must submit a certification that the property was built in compliance with all applicable laws.

(g) The Department will conduct a final inspection after receipt of notification of construction completion. During the inspection, the Department will confirm that committed amenities have been provided and inspect for compliance with the applicable laws referenced in subsection (b) of this section.

(h) Owners will be provided a written notice after the final inspection. If any deficiencies are noted, a 90 day corrective action period will be provided.

(i) Forms 8609 and final retainage will not be released until the owner receives written notice from the Department that all noted deficiencies have been resolved.

(j) During any construction inspection, if the owner and the Department are unable to agree that an identified issue is a violation, the owner must request Alternative Dispute Resolution. The process for engaging ADR is outlined in §60.123 of this chapter.

§60.104. Recording of Land Use Restriction Agreements (HTC Properties).

(a) In general, no credit is allowable for a building unless there is a properly executed LURA in effect at the end of the first year of the credit period. Requests for a LURA must be provided no later than September 1st of the calendar year in which the owner intends to have it recorded. A request for a LURA received after September 1st may not be able to be processed by the Department in the same calendar year.

(b) Land Use Restriction Agreements will impose the rent and income restrictions identified in the property's final underwriting report.

(c) The Department will not issue Forms 8609 until it receives the original recorded LURA.

§60.105. Reporting Requirements.

(a) The Department requires reports to be submitted electronically through the Department's web-based Compliance Monitoring and Tracking System (CMTS) and in the format prescribed by the Department. The Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Administrator of Accounts forms must be filed no later than September 1st of the year following the award. The Department will provide general instruction regarding the electronic transfer of data. Under special circumstances, the Department may, at its discretion, waive the online reporting requirements where a hardship can be demonstrated. In the absence of a written waiver, all Developments are required to submit reports online.

(b) Each Development is required to submit an Annual Owner's Compliance Report (AOCR). Depending on the property, some or all of the Report must be submitted. The first AOCR is due the second year following the award. For example, if a Development is awarded funds in calendar year 2007, the first report is due in 2009. The AOCR is comprised of 4 sections:

(1) Part A "Owner's Certification of Program Compliance." All Development Owners must annually certify to compliance with applicable program requirements. The AOCR Part A shall include answers to all questions required by Treasury Regulation 1.42-5(b)(1) or the applicable program rules. In addition, owners, with the exception of the FDIC's Affordable Housing Program properties, are required to report on the racial and ethnic composition of individuals and families applying for and receiving assistance. Housing Tax Credit properties during the Compliance Period will also be required to provide the name and mailing address of the syndicator in the Annual Owner's Compliance Report.

(2) Part B "Unit Status Report." All Developments must annually report the information related to individual household income, rent, certification dates and other necessary data to ensure compliance with applicable program regulations.

(3) Part C "Housing for Persons with Disabilities." The Department must establish a system that requires owners of state or federally assisted housing Developments with 20 or more housing Units to report information regarding housing Units designed for persons with disabilities. The questions on Part C satisfy this requirement. The FDIC's Affordable Housing Properties are not required to submit Part C of the Annual Owner's Compliance Report.

(4) Part D "Owner's Financial Certification." Developments funded by the Department must annually provide the data requested in the Owner's Financial Certification. The FDIC's Affordable Housing Properties are not required to submit Part D of the Annual Owner's Compliance Report.

(c) Parts A, B and C of the Annual Owner's Compliance Report must be provided to the Department no later than March 1st of each year, reporting data current as of December 31 of the previous year (the reporting year). Part D, "Owner's Financial Certification", which includes the current audited financial statements and income and expenses of the Development for the prior year, must be submitted to the Department no later than the last day of April each year.

(d) Any Development for which the AOCR, Part A, "Owner's Certification of Program Compliance," is not received or is received past the due date will be considered not in compliance with these rules. If Part A is incomplete, improperly completed or not submitted by the Development Owner, it will be considered not received and not in compliance with these rules. The Department will report to the IRS on form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition, any HTC Development that fails to comply with this requirement.

(e) Department staff will review Part A of the AOCR for compliance with the requirements of the appropriate program. If it appears that the property is not in compliance based upon the report, the owner

will be given written notice and provided a corrective action period to clarify or correct the report. If the owner does not respond to the notice, the report will be subject to the sanctions listed in subsections (f) and (g) of this section.

(f) If any required section, or sections (Parts A, B, C or D), of the report are not received on or before the deadline for submission specified in subsection (c) of this section, a notice of noncompliance will be sent to the owner, specifying a corrective action deadline. If the report is not received on or before the corrective action deadline the Department shall:

(1) For all HTC properties, issue form 8823 notifying the Internal Revenue Service of the violation.

(2) For all properties, score the noncompliance in accordance with §60.121 of this chapter.

(g) The Department may assess and enforce the following sanctions against a Housing Sponsor who fails to submit the AOCR on or before March 1 of each year. These sanctions will be assessed for multiple, consistent and/or repeated violations of failure to submit the AOCR by March 1 of each year.

(1) Impose a late processing fee in an amount equal to $1,000;

(2) A HTC Development that fails to submit the required AOCR three consecutive years in a row may be reported to the Internal Revenue Service as no longer in compliance and never expected to comply.

(h) Periodic Unit Status Reports. HOME, Housing Trust Fund, the FDIC's Affordable Housing Properties and properties funded under the Department's CDBG Disaster Recovery Program, shall provide tenant information provided on Part B, "Unit Status Report," at least quarterly during lease up and until occupancy requirements are achieved. Once the Department determines that all occupancy requirements are met, the Development shall submit the Unit Status Report at least annually and as required by this section.

(i) Developments financed by Tax Exempt Bonds issued by the Department shall report quarterly throughout the Qualified Project Period unless notified by the Department of a change in the reporting frequency.

(j) Owners are encouraged to continuously maintain current resident data in the Department's Compliance Monitoring and Tracking System. Under certain circumstances, such as in the event of a natural disaster, the Department may require all Developments to provide current occupancy data through the Department's Compliance Monitoring and Tracking System.

(k) All rental Developments funded or administered by the Department will be required to submit a current Unit Status Report prior to an onsite monitoring visit.

§60.106. Record Keeping Requirements.

(a) Development Owners must comply with program record-keeping requirements. Records must include sufficient information to comply with the reporting requirements of §60.105 of this chapter and any additional programmatic requirements. Housing tax credit property owners must retain records sufficient to comply with the reporting requirements of Treasury Regulation 1.42-5(b)(1). Records must be kept for each qualified low income rental Unit and building in the Development, commencing with lease up activities and continuing on a monthly basis until the end of the Affordability Period.

(b) Each Development that is administered by the Department including the FDIC's AHP is required to retain the records as required by the specific funding program rules and regulations. In general, retention schedules include but are not limited to the provision of subsections (c) - (f) of this section.

(c) HTC records must be retained for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building. (§1.42-5(b)(2) of the Code)

(d) Retention of records for HOME rental Developments and the CDBG Disaster Recovery program must comply with the provisions of 24 CFR §92.508(c) which generally requires retention of rental housing records for five years after the Affordability Period terminates.

(e) Housing Trust Fund (HTF) rental Developments must retain tenant files for at least three years beyond the date the tenant moves from the Development. Records pertinent to the funding of the award, including but not limited to the Application, development costs and documentation, must be retained for at least five years after the Affordability Period terminates.

(f) Other rental Developments funded or administered in whole or in part by the Department must comply with record retention requirements as required by rule or deed restriction.

§60.107. Notices to the Department.

(a) If any of the events in paragraphs (1) - (3) of this subsection occur, written notice must be provided to the Department within the timeframes listed below:

(1) Any sale, transfer, exchange, of the Development or any portion of the Development. Notification must be provided at least 30 days prior to this event.

(2) The Development suffers in whole or in part a casualty loss. Notification must be provided within 30 days following the event of loss.

(3) Owners of Tax Exempt Bond Developments shall notify the Department of the date 10 percent of the Units are occupied and the date 50 percent of the Units are occupied within 90 days of such dates.

(b) Owners are responsible for maintaining current information (including contact persons, physical addresses, mailing addresses, and phone numbers) for the ownership entity, and management company in the Department's Compliance Monitoring and Tracking System (CMTS). Treasury Regulations require the Department to notify Housing Tax Credit owners of upcoming reviews and instances of noncompliance. The Department will rely on the owner supplied information in CMTS to meet this requirement.

§60.108. Determination, Documentation and Certification of Annual Income.

(a) For all programs administered by the Department, annual income shall be determined consistent with the Section 8 program, using the definitions of annual income described in HUD Handbook 4350.3 as amended from time to time.

(b) The Department permits owners to use check stubs or other documentation of income and assets provided by the applicant or household in lieu of employment verification forms. It is not necessary to first attempt to obtain an employment verification form as required by the HUD 4350.3.

(c) The Department requires the use of the TDHCA Income Certification form, unless the property also participates in the Rural

Development or a project Based HUD program, in which case, the other program's income certification form will be accepted.

§60.109. Utility Allowances.

(a) The Department will monitor to determine if HTC, Bond, CDBG and HTF properties comply with published rent limits which include an allowance for utilities. Where residents are responsible for some, or all, of the utilities--other than telephone and cable--Development Owners must use a utility allowance that complies with both this section and the applicable program regulation. An owner may not change utility allowance methods without the written approval from the Department.

(b) Farmer's Home Administration (FmHA) Buildings or buildings with FmHA assisted tenants layered with any Department program. The applicable utility allowance will be determined under the method prescribed by the Farmer's Home Administration (or successor agency).

(c) HUD-Regulated buildings layered with any Department program. If neither the building nor any tenant in the building receives FmHA rental assistance payment, and the rents and the utility allowances of the building are reviewed by HUD on an annual basis (HUD-regulated building), the applicable utility allowance for all rent restricted units in the building is the applicable HUD utility allowance.

(d) Other Buildings. For all other rent-restricted Units, Development Owners must use one of the following methods:

(1) The utility allowance established by the applicable Public Housing Authority. If the applicable PHA allowance lists flat fees for any utility, those flat fees must be included in the calculation of the utility allowance if the resident is responsible for that utility.

(2) A written estimate from a local utility provider, or

(3) An allowance based upon an average of the actual use of similarly constructed and sized units in the building using actual utility usage data and rates, provided that the Development Owner has the written permission of the Department. This methodology is referred to as the "Actual Use Method."

(e) For a development owner to use the Actual Use Method they must:

(1) provide a minimum sample size of usage data for at least 5 continuously occupied units of each Unit Type or 20% of each Unit Type whichever is greater. *Example 109(1):* A property has 20 three bedroom one bath Units and 80 three bedroom two bath Units, data must be supplied for at least 5 of the three bedroom one bath Units and 16 of the three bedroom two bath Units. If there are less than 5 units of any Unit Type, data for 100% of the Unit Type must be provided.

(2) the following information must be scanned onto a CD and submitted to the Department within 45 days of receipt of the data from the utility provider:

(A) An Excel spreadsheet listing every unit on the property, the number of bedrooms, bathrooms and square footage for each Unit, and the billing history by month for each unit for which data was obtained.

(B) A copy of the request to the utility provider to provide usage data.

(C) All documentation obtained from the utility provider and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider.

(D) The rent roll showing occupancy as of the end of the month for the month in which the data was requested from the utility provider.

(E) Documentation of the current utility allowance used by the Development.

(3) Upon receipt of the required information, the Department will determine if the Development Owner has provided the minimum information necessary to calculate an allowance using the Actual Use Method. If so, the Department shall calculate the utility allowance for each bedroom size using the following guidelines:

(A) If data is obtained for more than 20% or 5 of each Unit Type, all data will be used to calculate the allowance.

(B) If more than 12 months of data is provided for any unit, only the data for the most current 12 months will be averaged.

(C) The allowance will be calculated by averaging the utility costs for all Unit Types within that bedroom size. For example, if sufficient data is supplied for 18 two bedroom one baths and 12 two bedroom two baths, the data for all 30 units will be averaged to calculate the allowance for all two bedroom Units.

(D) The allowance will be rounded up to the next whole dollar amount.

(4) The Department will complete its evaluation and calculation within 30 days of receipt of all the information requested in paragraph (2) of this subsection. If the allowance increases, owners must implement the allowance for all rent restricted Units within 90 days of the effective date. The effective date of the new utility allowances is the date of the notice to the owner establishing the new utility allowances computed under this subsection. The allowance calculated using the Actual Use Method will be valid for twelve months.

(5) Once the Actual Use Method is approved for use by the Department, the Development Owner must continue to provide the data listed in paragraph (2) of this subsection on an annual basis. The data must be supplied to the Department within 60 days of the expiration of the previous years' allowance. If the owner is unable to obtain the necessary billing histories from the utility provider in subsequent years, the owner must request permission to change utility allowance methods.

(f) Combining Methodologies. With the exception of HUD regulated buildings and FmHA buildings, Owners may combine any methodology described in this section for each utility service type (electric, water gas etc.). For example, if residents are responsible for electricity and water, an owner may use the appropriate PHA allowance to determine the water portion of the allowance and use the Actual Use Method to determine the electric portion of the allowance.

(g) Increases in Utility Allowances because the HOME final rule does not provide a grace period for implementing increased utility allowances, changes in utility allowances must be implemented on the published effective date. All other properties shall implement increases in utility allowances within 90 days of the effective date of the change.

§60.110. Lease Requirements (HTC and HOME Properties).

(a) For HTC properties, Revenue Ruling 2004-82 prohibits the eviction or termination of tenancy of low income households throughout the entire Affordability Period. Owners executing or renewing leases after November 1, 2007 shall specifically state in the lease or in an addendum attached to the lease that evictions or terminations of tenancy for other than good cause are prohibited.

(b) For HOME properties, the HOME final rule prohibits owners from evicting low income residents or refusing to renew a lease

except for serious or repeated violations of the terms and conditions of the lease, for violations of applicable federal state or local law, for completion of the tenancy period for transitional housing or for other good cause. To terminate tenancy, the owner must serve written notice upon the tenant specifying the grounds for the action at least 30 days before the termination of tenancy. Owners executing or renewing leases after November 1, 2007 shall specifically state in the lease or in an addendum attached to the lease that evictions or non-renewal of leases for other than good cause are prohibited. (24 CFR §92.253)

(c) The Department does not determine if an owner has good cause or if a resident has violated the lease terms. If there is a challenge to a good cause eviction, that determination will be made by a court of competent jurisdiction or an agreement of the parties in arbitration. The Department will rely on the court decision or the agreement of the parties.

§60.111. Income at Recertification (Housing Tax Credit Properties).

(a) Under the Code, HTC Development owners elect a minimum set aside requirement of 20/50 or 40/60 (20% of the units restricted to the 50% income and rent limits or 40% of the units restricted to the 60% income and rent limits). The minimum set aside elected by the Development Owner sets the maximum income and rent limits at the property. Many HTC development owners agreed to lease Units to households with an annual income and rent lower than the maximum limits (for example at the 30%, 40% or 50% income and rent limits) established by the minimum set aside election of the Owner. This requirement is referred to as "additional occupancy restrictions" and is reflected in the Development's Land Use Restriction Agreement. Household income at recertification for the additional occupancy restrictions will be monitored as follows:

(b) Households initially designated at the 30% income and rent limits. If upon recertification, the household's income exceeds the 30% limit, but remains less than the 40% limit, the unit will continue to meet the 30% set aside requirement provided that the owner does not charge rent in excess of the 30% rent limits. If upon recertification, the household's income exceeds the 40% limit, but is less than the 50% limit, the unit will continue to meet the 30% set aside requirement provided that the owner does not charge rent in excess of the 40% rent limits. If the household's income exceeds the 50% income limit, the unit no longer meets the 30% set aside requirement. The household will not be required to vacate the unit. The owner will not be found in noncompliance provided that the next available unit on the property is leased to a household with an income and rent less than the 30% limits. If the household is replaced, the rent for the previously qualified Unit may be increased to the limit established by the minimum set aside, subject to applicable tax credit requirements, lease provisions and local tenant-landlord laws.

(c) Households initially designated at the 40% income and rent limits. If upon recertification, the household's income exceeds the 40% limit, but is less than the 50% limit, the unit will continue to meet the 40% set aside requirement provided that the owner does not charge rent in excess of the 40% rent limits. If the household's income exceeds the 50% income limit, the unit no longer meets the 40% set aside requirement. The household will not be required to vacate the unit. The owner will not be found in noncompliance, provided that the next available unit on the property is leased to a household with an income and rent less than the 40% limits. If the household is replaced, the rent for the previously qualified Unit may be increased to the limit established by the minimum set aside, subject to applicable tax credit requirements, lease provisions and local tenant-landlord laws.

(d) Households initially designated at the 50% income and rent limits (for HTC properties with the 40/60 minimum set aside). If the household's income exceeds the 50% income limit, the unit no longer meets the Development's additional occupancy restriction. The household will not be required to vacate the unit. The owner will not be found in noncompliance, provided that the next available unit on the property is leased to a household with an income and rent less than the 50% limits. Once the household has been replaced, the rent for the previously qualified Unit may be increased to the limit established by the minimum set aside, subject to applicable tax credit requirements, lease provisions and local tenant-landlord laws. *Example 111.1:* A 100 unit property agreed to lease 10 units to households with an income and rent under the 30% limits. The remaining 90 units are subject to the 60% income and rent limits. Upon recertification, it is determined that one of the 30% households has experienced an increase in income; their re-certified annual income is now between the 40% and 50% income limits. The owner can continue to count this unit towards the 30% set aside provided that the rent charged remains at or below the 40% rent limit.

(e) This section does not apply to households designated at the maximum income and rent limits required by the Code. Nor does this section in any way require a Development to lease more units under the additional occupancy restrictions than established in the Land Use Restriction Agreement.

§60.112. Requirements Pertaining to Households with Rental Assistance.

(a) The Department will monitor to ensure Development Owners comply with §2306.269 and §2306.6728, Texas Government Code regarding residents receiving rental assistance under Section 8, United States Housing Act of 1937 (42 U.S.C. §1437F).

(b) The policies, standards, and sanctions established by this section apply only to:

(1) multifamily housing Developments that receive the following assistance from the Department on or after January 1, 2002: (§2306.185)

(A) a loan or grant in an amount greater than 33% of the market value of the Development on the date the recipient took legal possession of the Development; or

(B) a loan guarantee for a loan in an amount greater than 33% of the market value of the Development on the date the recipient took legal title to the Development;

(2) multifamily rental housing Developments that applied for and were awarded housing tax credits after 1992.

(3) housing Developments that benefit from the incentive program under §2306.805 of the Texas Government Code.

(c) Housing Sponsors of multifamily rental housing Developments described in subsection (a) of this section are prohibited from:

(1) excluding an individual or family from admission to the Development because the individual or family participates in the HOME Tenant Based Rental Assistance Program or the housing choice voucher program under Section 8, United States Housing Act of 1937 (42 U.S.C. §1437f); and

(2) using a financial or minimum income standard for an individual or family participating in the voucher program that requires the individual or family to have a monthly income of more than 2.5 times the individual's or family's share of the total monthly rent payable to the owner of the Development. A household participating in the voucher program or receiving any other type of rental assistance may not be required to have a minimum income exceeding $2,500 per year.

(d) To demonstrate compliance with this section Housing Sponsors shall:

(1) State in their leasing criteria that the Development will comply with state and federal fair housing and antidiscrimination laws;

(2) Apply screening criteria, (rental, credit and/or criminal history) including employment policies uniformly and in a manner consistent with the Texas and Federal Fair Housing Acts, program guidelines, and the Department's rules;

(3) Approve and distribute an Affirmative Marketing Plan. The Affirmative Marketing plan must be provided to the property management and onsite staff. Housing Sponsors are encouraged to use HUD Form 935.2 or successors as applicable. The Affirmative Marketing Plan must identify methods to market the property to persons with disabilities. Additionally, the Affirmative Marketing plan must be displayed in the leasing office and available to the public on request.

§60.113. Onsite Monitoring.

(a) The Department may perform an onsite monitoring of any low income Development, and review and photocopy all documents and records supporting compliance with Departmental programs through the end of the Compliance Period or the end of the period covered by the Land Use Restriction Agreement, whichever is later. The Development Owner shall permit the Department access to the Development premises and records.

(b) The Department will perform onsite monitoring reviews of each low income Development. The Department will conduct:

(1) the first review of HTC Developments by the end of the second calendar year following the year the last building in the Development is placed in service.

(2) the first review of all other Developments as leasing commences.

(3) a subsequent reviews at least once every three years during the Affordability Period.

(4) a physical inspection of the Development including the exterior of the Development, Development amenities, and an interior inspection of a sample of Units.

(c) The Department will perform on site file reviews and monitor:

(1) a sampling of the low income resident files in each Development, and review the income certifications,

(2) the documentation the Development Owner has received to support the certifications,

(3) the rent records and any additional information that the Department deems necessary.

(d) At times other than on site reviews, the Department may request for review, in a format designated by the Department, information on tenant income and rent for each Low Income Unit and may require a Development Owner to submit copies of the tenant files, including copies of the income certification, the documentation the Development Owner has received to support that certification, and the rent record for any low income tenant.

(e) The Department will select the Low Income Units and tenant records that are to be inspected and reviewed. Original records are required for review. The Department will not give Development Owners advance notice that a particular Unit, tenant record, or a particular year will be inspected or reviewed. However, the Department will give reasonable notice to the Development Owner that an onsite inspection or a tenant record review will occur so the Development Owner may notify tenants of the inspection or assemble original tenant records for review. If a credible complaint of fraud or other egregious noncompliance is received, the Department reserves the right to conduct unannounced onsite monitoring visits.

§60.114. Monitoring for Social Services.

(a) If a property's Land Use Restriction Agreement requires the provision of social services, the Department will confirm this requirement is being met. Owners are required to maintain sufficient documentation to evidence that services are actually being provided. Documentation may be reviewed during onsite visits or must be submitted to the Department upon request.

(b) If an owner wishes to change the scope of services provided, prior approval from the Department is necessary. It is not necessary to obtain prior written approval to change the provider of services unless the scope of services is being changed. Failure to comply with the requirements of this section shall result in a finding of noncompliance.

§60.115. Monitoring for Non-Profit Participation or HUB Participation.

(a) If a property's Land Use Restriction Agreement requires the material participation of a non-profit or Historically Underutilized Business (HUB), the Department will confirm this requirement is being met throughout the development phase and ongoing operations of the property. Owners are required to maintain sufficient documentation to evidence that a non-profit or HUB is materially participating. Documentation may be reviewed during onsite visits or must be submitted to the Department upon request.

(b) If an owner wishes to change the non-profit, or HUB, prior approval from the Department is necessary. The Annual Owner's Compliance Report also requires owners to certify to compliance with this requirement. Failure to comply with the requirements of this section shall result in a finding of noncompliance. In addition, the Internal Revenue Service will be notified if the non-profit is not materially participating on a Housing Tax Credit property during the Compliance Period.

(c) The Department does not enforce partnership agreements or determine equitable fund distributions of partnerships. These disputes are matters for a court of competent jurisdiction.

§60.116. Property Condition Standards.

(a) All Developments funded by the Department must be decent, safe, sanitary and in good repair throughout the Affordability Period. The Department will use HUD's Uniform Physical Condition Standards (UPCS) to determine compliance with property condition. In addition, Developments must comply with all local heath, safety, and building codes. The Department may contract with a third party to complete UPCS inspections.

(b) Housing Tax Credit property owners are required by Treasury Regulation 1.42-5 to report (through the Annual Owner's Compliance Report) any local health, safety, or building code violations. HTC Developments that fail to comply with local codes shall be reported to the IRS.

(c) The Department will evaluate UPCS reports in the following manner:

(1) A finding of Major Violations will be cited if:

(A) uncorrected life threatening health, safety, or fire safety hazards (other than smoke detectors and blocked egresses which are addressed in subsection (d) of this section) are reported on the Notification of Exigent and Fire Safety Hazards Observed form in any building exterior, building system, common area, site, or dwelling Unit;

(B) 20% or more of buildings or dwelling Units inspected have any level three violation; or

(C) an overall UPCS score of less than 60% (59% or below) is reported.

(2) A finding of Minor Violations will be assessed if:

(A) 20% or more of the buildings or dwelling Units inspected have any level two violation; or

(B) An overall score between 60% and 79% is reported.

(3) Findings of both Major and Minor Violations will be assessed if deficiencies reported meet the criteria for both.

(d) Owners are ultimately responsible for compliance. However, the Department recognizes that despite an owner's effort to comply, residents may disable smoke detectors or arrange their furniture in a manner that blocks a fire egress. If inoperable smoke detectors or resident caused blocked egresses are noted during the UPCS inspection, they will not be taken into consideration for the purposes of the Department's evaluation of the report provided that the Department is notified of the correction within 72 hours. If the owner fails to notify the Department of the correction of inoperable smoke detectors and/or blocked egresses within 72 hours the property will be considered to have Major violations of the Uniform Physical Condition Standards.

(e) The Department must report to the Internal Revenue Service on form 8823 any HTC property fails to comply with the requirements of the UPCS or local codes at any time (including smoke detectors and blocked egresses). Accordingly, the Department will submit forms 8823 for any UPCS violation. However, if the violation(s) do not meet the conditions described in subsection (c)(1) or (2) of this section, no points will be assigned in the Department's compliance status evaluation of the property.

(f) Property representatives will have the opportunity and are encouraged to correct deficiencies while the inspector is on site. Such corrected items will not be assessed a finding unless there is a pattern of the same violation (25% or more of dwelling Units or buildings inspected with the same deficiency).

(g) Acceptable evidence of correction of deficiencies is a certification from an appropriate licensed professional that the item now complies with the inspection standard or other documentation that the violation has been corrected.

(h) The Department will provide a 90 day corrective action period to respond to a notice of noncompliance for violations of the Uniform Physical Condition Standards. The Department will grant up to an additional 90 day extension if there is good cause and the owner clearly requests an extension.

(i) The FDIC's Affordable Housing Program does not establish a specific set of property standards that owners must meet. Therefore, the Department cannot conduct physical assessments of the FDIC's Affordable Housing Properties. However, if the Department discovers that an owner is not adequately maintaining the physical condition of the property, the Department may request the owner make corrections and/or inform the local housing inspector. In addition, if the Department is notified by a local code enforcement entity that an Affordable Housing Property is not in compliance with local health, safety and building codes, the Department will notify the FDIC and cooperate with any enforcement activities requested by the FDIC.

(j) Section 92.251 of the HOME final rule requires rental property assisted with HOME funds to be maintained in compliance with all local codes and Housing Quality Standards (24 CFR §982.401). To meet this requirement, all HOME rental Development Owners must annually complete an HQS inspection of all HOME assisted Units. The Department will review for compliance with this requirement during onsite monitoring visits.

§60.117. Notice to Owners.

The Department will provide written notice to the Development Owner if the Department does not receive the AOCR or discovers through audit, inspection, review or any other manner that the Development is not in compliance with the provisions of the deed restrictions, conditions imposed by the Department, or program rules and regulations, including §42 of the IRC. The notice will specify a correction period of 90 days from the date of notice to the Development Owner, during which the Development Owner may respond to the Department's findings, bring the Development into compliance, or supply any missing documentation or certifications. The Department may extend the correction period for up to six months from the date of the notice to the Development Owner if there is good cause for granting an extension. If any communication to the Development Owner under this section is returned to the Department as refused, unclaimed or undeliverable, the Development may be considered not in compliance without further notice to the Development Owner. The Development Owner is responsible for providing the Department with current contact information, including address(es) and phone number(s). The Development Owner must also provide current contact information to the Department as required by §1.22 of this title (relating to Providing Current Contact Information to the Department).

§60.118. Special Rules Regarding Rents and Rent Limit Violations.

(a) Rent or Utility Allowance Violations of the maximum allowable limit (HTC). Under the housing tax credit program, the amount of rent paid by the household plus an allowance for utilities cannot exceed the maximum applicable limit (as determined by the minimum set aside elected by the owner) published by the Department. If it is determined that a Housing Tax Credit property, during the Compliance Period, collected rent in excess of the rent limit established by the minimum set aside, the Department will report the violation as corrected on the date that the rent plus the utility allowance is less than the applicable limit. The refunding of overcharged rent does not avoid the disallowance of the credit by the Internal Revenue Service.

(b) Rent or Utility Allowance Violations of additional rent restrictions (HTC). If the owner agreed to lease Units at rents less than the maximum allowed under the Code (additional occupancy restrictions), the Department will require the owner to refund to the affected residents the amount of rent that was overcharged. This applies during the entire Affordability Period. The noncompliance event will be considered corrected on date which is the later of the date the overcharged rent was refunded/credited to the resident or the date that the rent plus the utility allowance is equal to or less than the applicable limit. *Example 118(1):* For Internal Revenue Code §42 purposes, the maximum allowable limit in 60%. However, the owner agreed to lease some units to households at the 30% income and rent limits. It was discovered that the 30% households were overcharged rent. The owner will be required to reduce the current amount of rent charged and refund the excess rents to the households.

(c) Rent or Utility Allowance Violations on Non Housing Tax Credit properties. If it is determined that the property collected rent in excess of the allowable limit, the Department will require the owner to refund to the affected residents the amount of rent that was overcharged. The issue will be considered corrected on date which is the later of the date the overcharged rent was refunded/credited to the resident or the date that the rent plus the utility allowance is less than the applicable limit.

(d) Trust Account to be established. If the owner is required to refund rent under subsection (b) or (c) of this section and cannot locate the resident, the excess rent collected must be deposited into a trust account for the tenant. The account must remain open for a four year period or until all funds are claimed.

(e) Rent Adjustments for HOME properties. Section 92.252 of the HOME Final Rule requires owners to charge households with an income in excess of 80% at recertification, a rent equal to the lesser of 30% of the household's adjusted income or the market rent for comparable unassisted units in the neighborhood. The Department will find a HOME property in noncompliance with this section if the owner fails to determine the over income household's adjusted income or maintain documentation of market rents for comparable unassisted Units in the neighborhood.

(f) Special conditions for CDBG properties. To determine if a unit is rent restricted, the amount of rent paid by the household, plus an allowance for utilities, plus any rental assistance payment must be less than the applicable limit.

§60.119. Notices to the Internal Revenue Service (HTC Properties).

(a) Even when an event of noncompliance is corrected, the Department is required to file IRS Form 8823 with the IRS. IRS Form 8823 will be filed not later than 45 days after the end of the correction period specified in the Notice to Owner (including any extensions permitted by the Department) but will not be filed before the end of the correction period. The Department will indicate on IRS Form 8823 the nature of the noncompliance and will indicate whether the Development Owner has corrected the noncompliance.

(b) The Department will retain records of noncompliance or failure to certify for six years beyond the Department's filing of the respective IRS Form 8823. The Department will retain the AOCRs and records for three years from the end of the calendar year the Department receives the certifications and records.

(c) The Department will send the owner of record copies of any IRS Forms 8823 submitted to the IRS. Copies of Form(s) 8823 will be submitted to the syndicator for Developments awarded tax credits after January 1, 2004. The Development Owner is responsible for providing the name and mailing address of the syndicator in the Annual Owner's Compliance Report.

§60.120. Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period.

(a) Housing Tax Credit properties allocated credit in 1990 and after are required under the Code (§42(h)(6)) to record a LURA restricting the property for 30 years. Various sections of the Code specify monitoring rules State Housing Finance Agencies must implement during the Compliance Period.

(b) After the Compliance Period, the Department will continue to monitor Housing Tax Credit Developments using the rules detailed in paragraphs (1) - (13) of this subsection.

(1) On site monitoring visits will continue to be conducted approximately every three years, unless the Department determines that a more frequent schedule is necessary;

(2) In general, the Department will review 10% of the low income files. No less than 5 files and no more than 20 files will be reviewed;

(3) The exterior of the property, all building systems and 20% of the Units will be physically inspected to determine compliance with HUD's Uniform Physical Condition Standards;

(4) Each Development shall submit an annual report in the format prescribed by the Department;

(5) Reports to the Department must be submitted electronically as required in §60.105 of this chapter;

(6) Compliance monitoring fees will continue to be submitted to the Department annually in the amount stated in the LURA;

(7) All households must be income qualified upon initial occupancy of any Low Income Unit. Proper verifications of income are required, and the Department's Income Certification form must be completed unless the Development participates in the Rural Rental Housing Program or a project based HUD program;

(8) Rents will remain restricted for all Low Income Units. The tenant paid portion of the rent plus the applicable utility allowance must not exceed the applicable limit;

(9) Owners and managers must continue to screen households for income, assets, and household size on an annual basis. In addition, an Income Certification form must be completed on an annual basis;

(10) All additional income and rent restrictions defined in the LURA remain in effect;

(11) Other requirements defined in the LURA, such as the provision of social services or serving special needs households, will remain in effect;

(12) The owner shall not terminate the lease or evict the resident or refuse to renew the lease except for Material Noncompliance with the lease or other good cause; and

(13) The total number of required Low Income Units must be maintained Development wide.

(c) After the first 15 years of the Extended Use Period, certain requirements will not be monitored as detailed in paragraphs (1) - (4) of this subsection.

(1) At recertification verification of income and assets will not be required;

(2) The student restrictions found in §42(i)(3)(D) of the Code. An income qualified household consisting entirely of full time students may occupy a Low Income Unit;

(3) The Available Unit Rule found in Treasury Regulation §1.42-15; and

(4) The building applicable fraction found in the Development's Cost Certification and/or the LURA. Low income occupancy requirements will be monitored Development wide, not building by building.

(d) Unless specifically noted in this section, all requirements of this chapter and §42 of the Internal Revenue Code remain in effect for the Extended Use Period. These Post Year 15 Monitoring Rules apply only to the Housing Tax Credit Developments administered by the Department. Participation in other programs administered by the Department may require additional monitoring to ensure compliance with the requirements of those programs.

§60.121. Material Noncompliance Methodology.

(a) The Department maintains a compliance history of each monitored Development in the Department's Compliance Status System. Developments with more than one program administered by the Department are scored by program. The Development will be considered in Material Noncompliance if the score for any single program exceeds the noncompliance limit for that program.

(b) A Development will not be assigned the scores noted in this section until after the owner has been provided a written notice of the noncompliance and provided a corrective action deadline to show that either the property never was in noncompliance or that the noncompliance event has been corrected.

(c) This section identifies all possible noncompliance events for all programs monitored by the Department. However, not all issues

listed in this section pertain to all Developments. In addition, only certain noncompliance events are reportable on form 8823. Those events that are reportable under the Housing Tax Credit program on form 8823 are so indicated in subsections (k) and (j) of this section.

(d) For Housing Tax Credit Developments, all forms 8823 issued by the Department will be entered into the Department's Compliance Status System. However, forms 8823 issued prior to the development of January 1, 1998 will not be considered in determining Material Noncompliance.

(e) For all programs, a Development will be in Material Noncompliance if the noncompliance event is stated in this section to be Material Noncompliance. The Department may take into consideration the representations of the Applicant regarding noncompliance events; however, the compliance records of the Department shall be presumed to be correct.

(f) All Developments, regardless of status, that are or have been administered, funded, or monitored by the Department are scored even if the Development no longer actively participates in the program.

(g) A Development's score will be reduced by the number of points needed to be one point under the Material Noncompliance threshold under the following circumstances:

(1) The Development has no uncorrected noncompliance events, and

(2) All noncompliance events were corrected during the corrective action period, and

(3) All corrective action documentation was provided to the Department during the corrective action period.

(h) Noncompliance events are categorized as either "Development events" or "Unit/building events." Development events of noncompliance affect some or all the buildings in the Development; however, the Development will receive only one score for the noncompliance event rather than a score for each building. Other noncompliance events are identified individually by Unit and will receive the appropriate score for each Unit cited with an event. The Unit scores and the Development scores accumulate towards the total score of the Development. Violations under the HTC program are identified by Unit; however, the building is scored rather than the Unit and the building will receive the noncompliance score if one or more of the Units are in noncompliance.

(i) Uncorrected noncompliance events, if applicable to the Development, will carry the maximum number of points until the noncompliance event has been reported corrected by the Department. Once reported corrected by the Department, the score will be reduced to the "corrected value." Corrected noncompliance will no longer be included in the Development score three years after the date the noncompliance was reported corrected by the Department.

(j) Each noncompliance event is assigned a point value. The possible events of noncompliance and associated "corrected" and "uncorrected" points are listed in subsection (k) of this section.

(k) The chart below lists events of noncompliance that affect the entire development rather than an individual unit. The first column of the chart identifies the noncompliance event. The second column identifies the number of points assigned this event while the issue is uncorrected. Material Noncompliance for a HTC property is 30 points. Material noncompliance for a non HTC property with 51 to 200 Low Income Units is 50 points. Material Noncompliance for Non HTC properties with 201 or more low income units is 80 points. The third column lists the number of points assigned this event when the issue is corrected until three years after correction. The fourth column indicates what programs the noncompliance event applies to. The last column indicates if the issue is reportable on form 8823 for Housing Tax Credit properties.
Figure: 10 TAC §60.121(k)

(l) The chart below lists 10 events of noncompliance associated with individual units. The first column of the chart identifies the noncompliance event. The second column identifies the number of points assigned this event while the issue is uncorrected. Material Noncompliance for a HTC property is 30 points. Material noncompliance for a non HTC property with 51 to 200 Low Income Units is 50 points. Material Noncompliance for Non HTC properties with 201 or more low income units is 80 points. The third column lists the number of points assigned this event when the issue is corrected until three years after the event is corrected. The fourth column indicates what programs the noncompliance event applies to. The last column indicates if the issue is reportable on form 8823 for Housing Tax Credit properties.
Figure: 10 TAC §60.121(l)

§60.122. Previous Participation Reviews.

(a) Prior to providing any Department assistance, executing a Carryover Allocation Agreement or processing a request for a Qualified Contract, the Portfolio Management and Compliance Division will conduct a previous participation review to determine if the requesting entity owes the Department any fees, has any outstanding audit issues or any uncorrected issues of noncompliance. Assistance includes but is not limited to allocating any Department funds, permitting the transfer of ownership of a property, engaging in loan or contract or LURA modifications, and providing incentive awards.

(b) If during the previous participation review an uncorrected issue of noncompliance is identified on a HOME Development monitored by the Department, the entity requesting assistance will be notified of the issue and provided a 5 day period to submit all necessary corrective action to cure the violation(s). The notification will be in writing and may be delivered by email. If the requesting entity does not cure the issues, the Application for assistance will be terminated. If the application is terminated the applicant has the ability to appeal as provide in §1.7 of this title.

(c) If during the previous participation review, the Department determines that the requesting entity has control of an existing Development monitored by the Department that is in Material Noncompliance the Application for assistance will be terminated.

(d) If during the previous participation review, the Department determines that the requesting entity is on the Department's or the Department of Housing Urban Development's debarred list, the Application for assistance will be terminated.

(e) In accordance with §2306.057 of the Texas Government Code, the Board shall fully document and disclose any instances in which the Board approves a project Application despite any noncompliance associated with the project, applicant, or affiliate. If an Application is terminated because of the Previous Participation Review, the applicant may appeal the decision in accordance with §1.7 or §1.8 of this title.

(f) Treatment of previously owned Developments during a Previous Participation review:

(1) The Department will not take into consideration the score of a Development transferred by the applicant over three years ago.

(2) The Department will not take into consideration the score of a Development whose Affordability Period ended over three years ago.

(3) If the property was transferred less than three years ago, the Department will determine the score for the noncompliance events with a date of noncompliance identified during the applicant's period of ownership. If the points associated with the noncompliance events identified during the applicant's period of ownership exceed the threshold for Material Noncompliance, the Application will not be recommended.

(g) Date for determining of Material Noncompliance. For HTC Applications, the score in effect on May 1st of the year the HTC Application is submitted will be used. For Carryover Allocations, the score in effect on October 1st of the year the award is being made will be used. For all other requests for assistance, the score in effect the day of Previous Participation Review is being conducted will be used.

§60.123. Alternative Dispute Resolution (ADR).

(a) It is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures (ADR) to assist in resolving disputes under the Department's jurisdiction. If at any time an applicant or other person would like to engage the Department in an ADR process, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title.

(b) In all phases of monitoring (construction and throughout the entire Affordability Period) if a potential issue of noncompliance has been identified, owners will be provided a written notice of noncompliance. The Department will provide a 90 day corrective action period which can and will be extended for an additional 90 days if there is good cause and the owner requests an extension.

(c) Owners must respond to the Department's notice of noncompliance. If an owner does not respond, this ADR process which is explained in this section cannot be initiated.

(d) If an owner does not agree with the Department's assessment of compliance, they should clearly explain their position and provide as much supporting documentation as possible. If the position is reasonable and well supported, the issue of noncompliance will be cleared with no further action taken, i.e. for HTC properties, form 8823 will not be filed with the Internal Revenue Service and the issue will not be scored in the Department's compliance status system.

(e) If an owner's response indicates disagreement with the Department's assessment of noncompliance, but does not appear to be a valid concern to the Department, staff will notify the owner in writing of their right to engage in ADR. The owner must respond in 5 days and request ADR. In addition, the owner must request an extension of the corrective action deadline, if one is still available. If the owner does not respond to the staff's invitation to engage in ADR, the Department's assessment of the violation is final.

(f) The Department must meet the Treasury Regulation requirement found in §1.42-5 and file form 8823 within 45 days after the end of the corrective action period. Therefore it is possible that the owner and Department may still be engaged in ADR. In this circumstance, the form 8823 will be filed. However, it will be sent to the IRS with an explanation that the owner disagrees with the Department's assessment and is pursuing ADR. All owner supplied documentation supporting their position will be supplied to the IRS. Although the violation will be reported to the IRS within the required timeframes, it will not be scored in the Department's compliance status system pending outcome of ADR.

§60.124. Liability.

Compliance with the program requirements including compliance with §42 of the IRC, is the sole responsibility of the Development Owner. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Development Owner including the Development Owner's noncompliance with §42 of the IRC, the Fair Housing Act, Section 504 of the Rehabilitation Act of 1973, HOME program regulations, BOND program requirements, and all other programs monitored by the Department.

§60.125. Applicability.

Unless otherwise noted, these provisions apply to all Developments administered by the Department.

§60.126. Waiver.

The Board, in its discretion and within the limits of law, may waive any one or more of these Rules if the Board finds that a waiver is appropriate to fulfill the purposes or policies of Chapter 2306, Texas Government Code, or for other good cause, as determined by the Board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703891
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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SUBCHAPTER C. ADMINISTRATIVE PENALTIES

10 TAC §§60.301 - 60.309

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 60, Subchapter C, §§60.301 - 60.309, concerning the Enforcement provisions and Administrative Penalty Table for failure to comply with Land Use Restriction Agreements and Compliance Rules. The new subchapter implements Chapter 2306, §§2306.041 - 2306.0503 of the Texas Government Code, as amended by Senate Bill 1908 in the 80th regular legislative session, and other provisions of Texas Government Code, Chapter 2306, authorizing the Department to administer federal housing programs. The new subchapter relates to the Department's operation and administration of administrative penalties, enforcement, and related administrative proceedings.

Michael Gerber, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no additional cost to state or local governments as a result of enforcing or administering the new sections.

Mr. Gerber has also determined that for the first five-year period the new sections are in effect the public will benefit by enforcing previously agreed to provisions to provide low income housing and related standards associated with providing low income housing. Mr. Gerber has also determined that for the first five-year period there will be no economic cost to individuals required to comply with the new sections and no adverse economic effect on small businesses as long as they remain in compliance with their current agreements.

Public hearings will be held across the state between September 24 and October 5 to receive public input on this new

subchapter. More information on the public hearings can be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, 2008 Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: 2008rulecomments@tdhca.state.tx.us, or by fax to (512) 475-3978. All comments must be received by October 10, 2007.

The new sections are proposed under Texas Government Code §§2306.041 - 2306.0503, which requires the department to adopt rules to impose a penalty and the administrative procedures necessary to meet due process requirements for doing, and Texas Government Code §2306.053 providing the Department powers and duties to provide low income housing and the Land Use Restriction Agreements related to the long term assurance of the same.

No other statutes, articles, or codes are affected by the proposed sections.

§60.301. Purpose.

(a) The purpose of this subchapter is to assist with the enforcement of all applicable laws including Chapter 2306, Board Rules, LURAs, Applications, Covenants filed in conjunction with awards and Board Orders vests in the Board and the Department.

(b) These rules do not apply to any local enforcement codes or building codes.

(c) The enforcement provisions shall be governed by these rules and 1 TAC Part 7, Chapter 155, as applicable, unless specifically indicated otherwise by these rules, incorporated herein by reference.

§60.302. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Cranston-Gonzalez National Affordable Housing Act codified at 42 U.S.C. §12704 et seq.

(2) Administrative Penalty--A monetary penalty per the penalty table assessed for failure to comply with the Act, a LURA, restrictive covenant, the rules found in Subchapters A and B of this chapter, or other federal or state law or rule identified in the penalty table as allowed under Texas Government Code §§2306.041 - 2306.042.

(3) Affiliated Party--A Person in a relationship with a Responsible Party or Owner. Does not apply to an Affiliated Party for Application purposes.

(4) Asset--A property covered by the Act, a LURA, Contract, grant agreement, or Commitment or any other property acquired, improved, or subsidized, directly or indirectly, in whole or in part with funds provided by any program(s) administered by the Department or purchased by a Subsequent Purchaser.

(5) Audit--An audit required to be performed by a third party or performed by the Department relating to a Contract.

(6) Board--The Governing Board of the Department.

(7) Chapter 2306--The enabling statute for the Department found in Texas Government Code Chapter 2306.

(8) Compliance Monitoring Fees--The fees identified in a LURA or other Contract payable by Project Owner related to an Asset.

(9) Compliance Rules--The rules found in Subchapters A and B of this chapter.

(10) Contract--Any executed written agreement between the Department and an Administrator, Home Owner, Mortgagor, Project Owner, Subrecipient, Subrecipient Organization, or other beneficiary of a Department program.

(11) Department--The Texas Department of Housing and Community Affairs.

(12) Development--Any Project that has a construction component, either in the form of new construction or the rehabilitation of residential housing with funds or credits supplied by the Department and subject to a LURA or other restrictive covenant.

(13) Director of Compliance--The person designated by the Executive Director with directing the activities of the division responsible for compliance or their designee, including subcontractors of the Department.

(14) Eligible Household--A household that meets the requirements associated with a Department Contract or LURA and applicable law, as in effect from time to time.

(15) Enforcement Committee--A committee of not more than five people assigned by the Executive Director to make recommendations on Enforcement including Administrative Penalties.

(16) Executive Director--As defined under Texas Government Code §2306.036 and/or §2306.038.

(17) Federal Laws and Rules--Treasury Regulations, United States Code and/or the Code of Federal Regulations, including but not limited to the current version of the Guide for Completing Form 8823 Low Income Housing Credit Agencies Report of Non-Compliance or Building Disposition promulgated by the Internal Revenue Service.

(18) LURA--Land Use Restriction Agreement that has been executed by the Department and a Person related to a specific property or properties and filed with required recording authorities.

(19) Owner--The Person who has the beneficial ownership of a Development whether through award of the Department or as a Subsequent Purchaser.

(20) Penalty Table--The table adopted by the Board detailing a schedule of proposed penalties for violations of identified actions commonly found in LURAs, other restrictive covenants, state and federal rules.

(21) Person--Any individual, partnership, corporation, association, trust, unit of government, community action agency, or public or private organization of any character, however organized.

(22) Proposal for Decision--A document issued by an administrative law judge that provides a statement of facts and conclusions of law for the Board to make a final determination on the Administrative Penalty.

(23) Responsible Party--The Person or other beneficiary of a Department program subject to this rule for purposes of enforcement.

(24) Subsequent Purchaser--A Person who is not the original awardee but purchases a development or Asset subject to a valid LURA, other restrictive covenant or state and federal rules associated with Chapter 2306.

(25) Terms--Any condition placed on the property through a LURA, restrictive covenant, loan document, application, or Federal Laws and Rules or rules promulgated by the Department as allowed by the laws of the State of Texas.

(26) Treasury Department--The U.S. Department of the Treasury, the Internal Revenue Service or related federal departments.

§60.303. Standards of Conduct.

(a) Responsible Parties or Owners are required to follow LURAs, covenants, or state and Federal Laws and Rules as promulgated by the appropriate legislative body or executive department.

(b) Responsible Parties or Owners are responsible for knowing the terms and conditions placed on their Assets and the application of Federal Laws and Rules and rules promulgated by the Department relevant to their Development.

§60.304. Violations of Standards and Rules.

(a) The Board may issues administrative penalties as specified in this chapter to persons who violate Terms.

(b) A violation occurs when either by action or failure to act a Responsible Party or Owner does not Comply with the Terms of an Asset.

(c) A Responsible Party or Owner who violates any provision of the Terms or order of the Board is subject tot a penalty of up to $1,000 per day per violation as allowed under these rules, the Penalty Table and Texas Government Code §2306.042.

§60.305. Investigation of Complaints.

Complaints shall be investigated under the requirements of Chapter 2306.

§60.306. Informal Conference.

(a) If the Enforcement Committee decides to offer an Informal Conference to a responsible Party or Owner, the Department shall give notice of the Informal Conference, including a summary of the alleged violation and the Responsible Party or Owner's right to request a hearing on the alleged allegations with the Board or their designated Administrative Law Judge.

(b) If the Informal Conference results in an agreed order, the Executive Director shall prepare the agreed settlement as an agreed final order for adoption by the Board.

(c) If the Informal Conference fails to result in an agreed order, the Executive Director shall set a formal hearing with the Board or their designated Administrative Law Judge.

§60.307. Administrative Penalty.

(a) If the Executive Director decides to pursue an administrative penalty under the Penalty Schedule adopted by the Board he shall provided Notice to the Board, or their designee, that briefly states the facts of the alleged violation, includes his recommendation of a penalty and the amount of the penalty.

(b) Within 14 days of notifying the Board under subsection (a) of this section, the Executive Director shall issue a Notice of Alleged Violation to the Responsible Party or Owner which must include a brief summary of the alleged violation, state the amount of the penalty pursued and inform the Responsible Party or Owner of their right to a Hearing before the Administrative Law Judge appointed by the Board to hear contested cases on the occurrence of the violation, the amount of the penalty, or both.

(c) If the Responsible Party or Owner chooses within 20 days after receipt of Notice to enter an agreed order either accepting the Executive Director's recommendation or agrees to corrective action with or without a penalty, without a formal hearing before the Board or their designated Administrative Law Judge, The Executive Director shall prepare a Board Order affirming the agreed order.

(d) The Responsible Party or Owner must pay the penalty within sixty (60) days following the Board Order and complete any corrective action within the agreed time period or be subject to penalties for violation of the Board Order affirming the agreed order.

(e) The Executive Director shall set a hearing with the Board or their Designated Administrative Law Judge if:

(1) the Respondent requests a formal hearing not later than the 20th day after the Notice of Alleged Violation is received by the Responsible Party or Owner;

(2) the Responsible Party or Owner fails to respond in writing to the Notice of Alleged Violation not later than the 20th day after the Notice of Alleged Violation is received by the Responsible party or Owner; or

(3) the Responsible Party or Owner fails to pay the penalty or complete the corrective action agreed to in the agreed order.

(f) The Executive Director may recommend for Debarment according to this title any Responsible Party or Owner who fails to:

(1) respond in writing to the Notice of Alleged Violation not later that the 20th day after the notice was received by the Responsible Party or Owner;

(2) perform according to the agreed settlement; or

(3) fails to pay the penalty assessed by the Board Order.

§60.308. Administrative Hearing Process.

(a) The Board shall request the Executive Director to provide the Board with access to an administrative law judge hired through the appropriate procurement process to hold hearings for the purpose of developing a Proposal For Decision. The administrative law judge shall serve at the pleasure of the Board, but administratively be employed as a subcontractor through the Executive Director. The administrative law judge shall not be a full time employee of the Department.

(b) If the Responsible Party or Owner has formally requested a hearing before the Board within the appropriate time frame, the administrative law judge shall conduct a formal hearing in accordance with this subchapter and based on the record created by the Executive Director and the Responsible Party or Owner or their counsel, issue a Proposal for Decision determining the findings of fact and conclusions of law in accordance with the rules and statutes governing the agency. The Proposal for Decision shall clearly indicate why any changes to the recommended penalty were made.

(c) The administrative law judge will provide the Board, the Executive Director and the Responsible Party or Owner or their counsel with a copy of the Proposal For Decision.

(d) Any party may file exceptions to the Proposal for Decision if they believe it misstates the law. The exceptions must state a legally reasoned response for the basis of the misstatement.

(e) The Board shall, based on the findings of fact and conclusions of law within the Proposal for Decision, and any exceptions properly filed, issue an order that finds:

(1) that a violation occurred and impose a penalty including a statement of the right of the subject of the order to seek judicial review of the order; or

(2) find that a violation did not occur.

(f) Not later than the 30th day after the date the Board's decision becomes final, the Person subject to the order shall:

(1) pay the penalty; or

(2) file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both.

(g) The penalty may be stayed under the terms of §2306.048 of the Texas Government Code.

(h) If timely filed, a decision will be made by the district court in Travis County under a de novo review.

(i) If the court sustains the finding that a violation occurred, the court may uphold or reduce the amount of the penalty and order the Person to pay the full or reduced amount of the penalty. If the court does not sustain the finding that a violation occurred, the court shall order that a penalty is not owed and may award the person reasonable attorney fees.

(j) The party filing the court action shall include in their prayer for relief that if the court finds in their favor that the order include a remittance of penalty and interest or release of the Bond.

(k) If the penalty is sustained, and the enforcement of the penalty is not stayed, the Department may collect the penalty. The Attorney General may sue to collect the penalty. This proceeding shall be a contested case under Chapter 2001 of the Texas Government Code.

§60.309. Penalty Table.

(a) The Department has developed penalties based on the following factors:

(1) the seriousness of the violation, including:

(A) the nature, circumstance, extent, and gravity of any prohibited act; and

(B) the hazard or potential hazard created to the health, safety, or economic welfare of the public;

(2) the history of previous violations;

(3) the amount necessary to deter a future violation;

(4) efforts made to correct the violation.

Figure: 10 TAC §60.309(a)(4)

(b) The amount of the penalty may be lowered based on presentation of information that would indicate that justice requires the downward adjustment of the penalty. Solely economic harm will not be considered as a factor for downward adjustment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703903
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 475-3916

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 175. FEES, PENALTIES AND FORMS

22 TAC §175.1

The Texas Medical Board proposes an amendment to §175.1, concerning Applications Fees.

The amendment increases fees in accordance with contingency revenue riders and the requirement to produce additional revenue for implementation of SB 29, SB 1731, HB 1973 and salary increases in HB 1.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously proposed the rule review of Chapter 175, Fees, Penalties and Forms.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. Individuals applying for licensure will pay an increased fee.

Mr. Simpson also has determined that for each year of the first five years the amendment as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to conform the board rule to requirements of recently passed legislation. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date. *Comments will be accepted for 25 days following the date of publication of this proposed amendment.*

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

§175.1. Application Fees.

The board shall charge the following fees for processing an application for a license or permit:

(1) Physician Licenses:

(A) Full physician license (includes surcharge of $205)--$885 [~~$805~~].

(B) Telemedicine license (includes surcharge of $205)--$885 [~~$805~~].

(C) Administrative medicine license (includes surcharge of $205)--$885 [~~$805~~].

(D) Reissuance of license following revocation (includes surcharge of $205) $885 [~~$805~~].

(E) Temporary license:

(i) Distinguished professor--$50.

(ii) State health agency--$50.

(iii) Visiting physician--$-0-.

(iv) Visiting professor--$110.

(v) National Health Service Corps--$-0-.

(vi) Faculty temporary license (includes surcharges of $280)--$680.

(vii) Postgraduate Research Temporary License--$-0-.

(viii) Medically underserved area--$50.

(ix) Regular--$50.

(F) Licenses and Permits relating to Medical Education:

(i) Initial physician in training permit (includes surcharge of $4)--$144.

(ii) Physician in training permit for program transfer (includes surcharge of $2)--$72.

(iii) Evaluation or re-evaluation of postgraduate training program--$250.

(2) Physician Assistants:

(A) Physician assistant license (includes surcharge of $5)--$205.

(B) Reissuance of license following revocation (includes surcharge of $5)--$205.

(C) Temporary license--$50.

(3) Acupuncturists/Acudetox Specialists/Continuing Education Providers:

(A) Acupuncture licensure (includes surcharge of $5)--$305.

(B) Temporary license for an acupuncturist--$50.

(C) Acupuncturist distinguished professor temporary license--$50.

(D) Acudetox specialist certification (includes surcharge of $2)--$52.

(E) Continuing acupuncture education provider--$50.

(F) Review of continuing acupuncture education courses--$50.

(G) Review of continuing acudetox acupuncture education courses--$50.

(4) Non-Certified Radiologic Technician permit (includes surcharge of $2)--$52.

(5) Non-Profit Health Organization initial certification--$2,500.

(6) Surgical Assistants:

(A) Surgical assistant licensure (includes surcharge of $5)--$305.

(B) Temporary license--$50.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703893
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7016

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PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 273. GENERAL RULES

22 TAC §273.4

The Texas Optometry Board proposes amendments to §273.4 concerning fees. The proposed amendments raise the license renewal fees by $2.00 in order to provide funding for the appropriations made by the 80th Legislature. Proposed amendments also change the late renewal fee for renewals one to ninety days late and for renewals 90 to 365 days late and the late fee for failure to timely obtain continuing education, since these fees are based on the license renewal fee.

Chris Kloeris, executive director of the Texas Optometry Board, has determined that, for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for local government as a result of enforcing or administering the amendments. For state government, there will be increased revenue of $7,200.00 of the first year of the biennium and each year thereafter that the amended license fee amounts are in effect. Increased revenue of $390.00 each year will be realized due to the modification of the late renewal amount. Increased revenue of less than $100 of the first year of the biennium and each year thereafter that fee amounts are in effect is expected from the amendment to the increase for late continuing education compliance.

Chris Kloeris also has determined that, for each of the first five years the proposed amendments, are in effect, the public benefit anticipated as a result of enforcing the amendments will be that funding for salary adjustments authorized by the 80th Legislature will be implemented and that licensees will timely renew licenses.

The economic costs for persons who are required to comply with the proposed amendments, including small businesses, will be the same additional $2.00 license fee increase for each license holder. No disparate effect is foreseen on small or micro-businesses as the fee is imposed on individual professionals regardless of the size of any business. The late renewal fee is only imposed on individuals failing to timely pay or obtain continuing education. Comments are solicited if a disparate cost of compliance can be established.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register.*

The amendment is proposed under the Texas Optometry Act, Texas Occupations Code, §§351.151, 351.152, 351.304, and 351.308; and House Bill 1, 80th Legislature. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession; §351.152 as granting the Board the authority to establish by rule reasonable and necessary fees to cover the costs of administering the act; §351.304 as setting the requirements for late renewal fees; and §351.308 as setting the fee for delayed continuing education compliance. House Bill 1 authorizes salary adjustments and the funding mechanism for the adjustments.

§273.4. Fees (Not Refundable).

(a) - (f) (No change.)

(g) License Renewal $186.00 [~~$184.00~~] plus $200.00 additional fee required by Section 351.153 of the Act, and plus $1.00 fee required by House Bill 2985, 78th Legislature. The inactive licensee fee does not include $200.00 additional fee. Total fees: $387.00 [~~$385.00~~] active renewal; $187.00 [~~$185~~] inactive renewal

(h) License fee for late renewal, one to 90 days late: $279.00 [~~$276.00~~] plus $200.00 additional fee required by Section 351.153 of the Act, and plus $1.00 fee required by House Bill 2985, 78th Legislature. The inactive licensee fee does not include $200.00 additional fee. Total late license fees: $480.00 [~~$477.00~~] active renewal; $280.00 [~~$277.00~~] inactive renewal

(i) License fee for late renewal, 90 days to one year late: $372.00 [~~$368.00~~] plus $200.00 additional fee required by Section 351.153 of the Act, and plus $1.00 fee required by House Bill 2985, 78th Legislature. The inactive licensee fee does not include $200.00 additional fee. Total late license fees: $573.00 [~~$569.00~~] active renewal; $373.00 [~~$369.00~~] inactive renewal

(j) Late fees (for all renewals with delayed continuing education) $186.00 [~~$184.00~~]

(k) - (o) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703853
Chris Kloeris
Executive Director
Texas Optometry Board
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-8502

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 461. GENERAL RULINGS

22 TAC §461.11

The Texas State Board of Examiners of Psychologists proposes amendments to rule §461.11, Continuing Education. The amendments are being proposed to clarify the requirements for proof of completion of online or self-study continuing education courses.

Sherry L. Lee, Executive Director, has determined that, for the first five-year period the proposed amendments will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that, for each year of the first five years the proposed rule amendment is in effect the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule amendment as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles, or statutes are affected by this amended section as proposed.

§461.11. Continuing Education.

(a) - (c) (No changes.)

(d) Documentation. It is the responsibility of each licensee to maintain documentation of all continuing education hours claimed under this rule and to provide this documentation upon request by the Board. Licensees shall maintain documentation of all continuing education hours claimed for at least five years. The Board will accept as documentation of continuing education:

(1) - (5) (No changes.)

(6) for online or self-study courses, a copy of the certificate of completion containing the name of the sponsoring organization, the title of the course, the number of pre-assigned continuing education hours for the activity, and stating that the licensee passed the examination given with the course. [~~generated by the completion of the course.~~]

(e) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703776
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7706

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CHAPTER 463. APPLICATIONS AND EXAMINATIONS

22 TAC §463.5

The Texas State Board of Examiners of Psychologists (Board) proposes amendments to rule §463.5, Application File Requirements. The amendments are being proposed to clarify to applicants for licensure that the Board requires criminal history record checks as a condition of licensure.

Sherry L. Lee, Executive Director, has determined that, for the first five-year period the proposed amendments will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that, for each year of the first five years the proposed rule amendment is in effect, the public benefit anticipated as a result of enforcing the amended rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles, or statutes are affected by this amended section as proposed.

§463.5. Application File Requirements.

To be complete, an application file must contain whatever information or examination results the Board requires. Unless specifically stated otherwise by Board rule, all applications for licensure by the Board must contain:

(1) An application and required fee(s);

(2) Official transcripts indicating the date the degree required for licensure was awarded or conferred. Transcripts must be sent directly to the Board's office from all colleges/universities where post-baccalaureate course work was completed;

(3) Documentation that applicant has complied with Board Rule §463.14 of this title (relating to Written Examinations);

(4) Three acceptable reference letters from three different psychologists, two of whom are licensed or were licensed at the time of applicant's training and none of whom are related to the applicant within the second degree of affinity or within the second degree of consanguinity;

(5) A criminal history record check of the applicant from the Texas Department of Public Safety and the Federal Bureau of Investigation;

(6) [~~(5)~~]Supportive documentation and other materials the Board may deem necessary, including current employment arrangements and the name of all jurisdictions where the applicant currently holds a certificate or license to practice psychology; and

(7) [~~(6)~~]A written explanation and/or meeting with the Board or a committee of the Board, prior to final approval, if the application file contains any negative reference letters.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703777
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7706

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CHAPTER 465. RULES OF PRACTICE

22 TAC §465.32

The Texas State Board of Examiners of Psychologists (Board) proposes amendments to rule §465.32, Disposition and Assumption of the Practice of a Mental Health Professional. The amendments are being proposed to correct grammatical and punctuation errors in this rule.

Sherry L. Lee, Executive Director, has determined that, for the first five-year period the proposed amendments will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that, for each year of the first five years the amended rule as proposed is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles, or statutes are affected by this amended section as proposed.

§465.32. Disposition and Assumption of the Practice of a Mental Health Professional.

(a) In General.

(1) - (3) (No change.)

(4) A licensee shall make provisions [~~arrange~~] for the transfer of his or her practice in the event of the licensee's death [~~in compliance with this section upon the death~~] or disability in compliance with this section, [~~of the licensee and with~~] all [~~other~~] applicable Board rules, [~~rules~~] and state and federal laws [~~law.~~]

(5) A non-licensee administrator or executor of a licensee's estate should be encouraged to dispose of the licensee's practice in accordance with this section.

(b) Notice and Referral of Patients and Clients.

(1) A licensee who intends to sell, retire, or otherwise dispose of a practice must make reasonable efforts [~~effort~~] to notify current and former patients or clients that on a given date the practice is being sold and that patient or client records will be transferred to the referent unless the patient or client provides the name of an alternative mental health care provider to receive the records. This notice must provide a reasonable time to the patients and clients to make suitable responses and arrangements.

(2) A licensee who assumes the practice of another mental health service provider may state his or her willingness to provide services to all patients or clients the licensee is competent to treat.

(3) A licensee who assumes a practice must provide an appropriate referral to a qualified mental health services provider to any patient or client who notifies the licensee that they do not want to receive services from the licensee or to a patient or client to whom the licensee declines to offer services.

(4) If the patient or client accepts a referral, the referring licensee must forward the patient or client's records [~~on~~] to that mental health professional.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703778
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7706

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22 TAC §465.33

The Texas State Board of Examiners of Psychologists proposes amendments to rule §465.33, Improper Sexual Conduct. The amendments are being proposed to correct grammatical and punctuation errors in this rule.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§465.33. Improper Sexual Conduct.

(a) - (b) (No change.)

(c) A sexual relationship is the engaging in any conduct that is sexual or may be reasonably interpreted as sexual in nature including, but not limited to:

(1) Sexual intercourse;

(2) Genital contact;

(3) Oral to genital contact;

(4) Genital to anal contact;

(5) Oral to anal contact;

(6) Touching breasts or genitals;

(7) Encouraging another to masturbate in one's presence; [~~presence.~~]

(8) Masturbation in another's presence; or

(9) Exposure of sexual organs, breasts [~~breast~~] or buttocks. [~~for sexual gratification.~~]

(d) A licensee may not engage in sexual harassment, sexual impropriety, or a sexual relationship with a current patient or client; [~~client,~~] a former patient or client over whom the licensee has influence due to a therapeutic relationship; [~~relationship, one of their~~] students [~~,~~] or trainees; [~~trainees,~~] individuals who the licensee knows to be the parents, guardians, spouses, significant others, children, or siblings of current patients; [~~patients,~~] or a supervisee over whom the licensee has administrative or clinical responsibility.

(e) Psychologists do not accept as clients individuals with whom they have engaged in sexual relationships.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703779
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7706

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22 TAC §465.35

The Texas State Board of Examiners of Psychologists proposes amendments to rule §465.35, Resolution of Allegations of Board Rule Violations. The amendments are being proposed to correct grammatical and punctuation errors in this rule.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§465.35. Resolution of Allegations of Board Rule Violations.

(a) When a licensee believes that there may have been an ethical or Board rule violation by another licensee that does not involve harm or potential harm to any member of the public, the licensee may attempt to resolve the issue by bringing it to the attention of that individual if informal resolution would not violate any confidentiality rights that may be involved. Licensees shall report any unresolved rule violations to the Board.

(b) A licensee must report conduct [~~a violation of the rules~~] by a licensee that appears to involve harm or the potential for harm to

any individual, [~~individual~~] or a violation of a Board rule, state law or federal law.

(c) A licensee must cooperate with any investigation conducted by the Board, including providing all requested information to the Board's Enforcement Division for thorough investigation of the complaint. Disclosure of patient information in an investigation is authorized by §611.006(a)(1) and (2) of the Texas Health and Safety Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703780
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7706

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22 TAC §465.38

The Texas State Board of Examiners of Psychologists proposes amendments to rule §465.38, Psychological Services for Public Schools. The amendments are being proposed to allow licensees from other states to count their experience in providing school psychological services in other states towards meeting the qualification requirements in Texas to supervise LSSPs.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§465.38. Psychological Services for Public Schools.

This rule acknowledges the unique difference in the delivery of school psychological services in the public schools from psychological services in the private sector. The Board recognizes the purview of the State Board of Education and the Texas Education Agency in safeguarding the rights of public school children in Texas. The mandated multidisciplinary team decision making, hierarchy of supervision, regulatory provisions, and past traditions of school psychological service delivery both nationally and in Texas, among other factors, allow for rules of practice in the public schools which reflect these occupational distinctions from the private practice of psychology.

(1) Definition.

(A) The specialist in school psychology license permits the licensee to provide school psychological services in Texas [~~the~~] public schools. [~~of this state.~~]

(B) A licensed specialist in school psychology (LSSP) means a person who is trained to address psychological and behavioral problems manifested in and associated with educational systems by utilizing psychological concepts and methods in programs or actions which attempt to improve the learning, adjustment and behavior of students. Such activities include, but are not limited to, addressing special education eligibility, conducting manifestation determinations, and assisting with the development and implementation of individual educational programs.

(C) The assessment of emotional or behavioral disturbance, for educational purposes, using psychological techniques and procedures is considered the practice of psychology.

(2) Titles. The correct title for persons [~~the person~~] holding this license [~~the Licensed Specialist in School Psychology~~] is Licensed Specialist in School Psychology or LSSP. Only individuals who meet the requirements of §465.6 of this title (relating to Listings, Public Statements and Advertisements, Solicitation, and Specialty Titles) may refer to themselves as School Psychologists. No individual may use the title Licensed School Psychologist.

(3) Providers of School Psychological Services. School psychological services may be provided in Texas public schools only by individuals authorized by this Board to provide such services. Individuals who may provide such school psychological services include LSSPs [~~licensed specialists in school psychology,~~] and interns or trainees as defined in §463.9 of this title (relating to Licensed Specialist in School Psychology). Nothing in this rule prohibits public schools from contracting with licensed psychologists and licensed psychological associates who are not LSSPs [~~licensed specialists in school psychology~~] to provide psychological services, other than school psychology, in their areas of competency. School districts may contract for specific types of psychological services, such as clinical psychology, counseling psychology, neuropsychology, and family therapy, which are not readily available from the licensed specialist in school psychology employed by the school district. Such contracting must be on a short term or part time basis and cannot involve the broad range of school psychological services listed in paragraph (1)(B) of this section. An LSSP who contracts with a school district to provide school psychological services may not permit an individual who does not hold a valid LSSP license to perform any of the contracted school psychological services.

(4) Supervision.

(A) Direct, systematic, face-to-face supervision must be provided to:

(i) Interns as defined in §463.9 of this title.

(ii) Individuals who meet the training requirements of §463.9 of this title and who have passed the National School Psychology Examination at the Texas cutoff score or above and who have been notified in writing of this status by the Board. These individuals may practice under supervision in a Texas public school district for no more than one calendar year. They must be designated as trainees.

(iii) LSSPs [~~Licensed specialists in school psychology~~] for a period of one academic year following licensure unless the individual also holds licensure as a psychologist in Texas. [~~this state.~~]

(iv) LSSPs [~~Licensed specialists in school psychology~~] when the individual [~~specialist~~] is providing psychological services outside his or her area of training and supervised experience.

(B) Nothing in this rule applies to administrative supervision of psychology personnel within Texas [~~the~~] public schools, performed [~~often done~~] by non-psychologists, in job functions involving, but not limited to, taking attendance, time management, completion of assignments, or adherence to school policies and procedures.

(5) Supervisor Qualifications. Supervision may only be provided by a LSSP, [~~licensed specialist in school psychology, including an individual who has obtained licensure by grandparenting,~~] who has a minimum of three years of experience providing psychological services in the public schools of this or another state. To meet supervisor qualifications, a licensee must be able to document the required experience by providing documentation from the authority that regulates the provision of psychological services in the public schools of that state and proof that the licensee provided such services, documented by the public schools in the state in which the services were provided. Any licensed specialist in school psychology may count one full year as an intern or trainee as one of the three years of experience required to perform supervision.

(6) - (7) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703781
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7706

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CHAPTER 469. COMPLAINTS AND ENFORCEMENT

22 TAC §469.7

The Texas State Board of Examiners of Psychologists proposes amendments to rule §469.7, Persons with Criminal Backgrounds. The amendments are being proposed to coincide with state law.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§469.7. Persons with Criminal Backgrounds.

(a) The Board may revoke or suspend an existing valid license, disqualify a person from receiving or renewing a license, or deny to a person the opportunity to be examined for a license due to a felony conviction if the offense directly relates to the performance of the activities of a licensee and the conviction directly affects such person's present fitness to perform as a licensee of this Board.

(b) The Board shall revoke an existing valid license, disqualify a person from receiving or renewing a license, or deny to a person the opportunity to be examined for a license due to a felony conviction under Section 35A.02 of the Texas Penal Code, concerning Medicaid fraud.

(c) [~~(b)~~] No person currently serving a sentence in prison for a felony is eligible to obtain or renew his/her license.

(d) [~~(c)~~] In determining whether a criminal conviction directly relates to the performance of a licensee, the Board shall consider the factors listed in the Texas Occupations Code, Chapter 53.

(e) [~~(d)~~] Those crimes which the Board considers as directly related to the performance of a licensee include but are not limited to:

(1) a misdemeanor and/or felony offense under the following titles of the Texas Penal Code:

(A) Title 5, pertaining to offenses against the person (for example, homicide, kidnapping, sexual offenses, and assaultive offenses);

(B) Title 7, pertaining to offenses against property (for example, arson, robbery, burglary, theft, fraud, money laundering, and insurance fraud);

(C) Title 8, pertaining to offenses against public administration (for example, bribery, perjury, and obstruction of justice);

(D) Title 9, pertaining to offenses against public order and decency (for example, disorderly conduct and public indecency);

(E) Title 10, pertaining to offenses against public health and safety (for example, weapons offenses, gambling, and intoxication offenses); and

(F) Title 4, pertaining to the offenses of attempting or conspiring to commit the offenses listed in subsections (a) - (e) of this section.

(2) any criminal violation of the Psychologists' Licensing Act or other statutes regulating or pertaining to the profession of psychology;

(3) any criminal violation of statutes regulating other professions in the healing arts, which includes, but is not limited to medicine and nursing;

(4) any crime involving moral turpitude;

(5) any offense involving the failure to report abuse;

(6) any state or federal drug offense, including violations of the Controlled Substances and Dangerous Drugs Act; and

(7) any other misdemeanor or felony that the Board may consider in order to promote the public safety and welfare, as well as the intent of the Act and these rules.

(f) [~~(e)~~] In determining whether a criminal conviction directly affects a person's present fitness, the Board shall consider the factors listed in Texas Occupations Code, Section 53.023.

(g) [~~(f)~~] It shall be the responsibility of the applicant to secure and provide to the Board the recommendations of the prosecution, law enforcement, and correctional authorities regarding all criminal offenses.

(h) [~~(g)~~] The applicant shall also furnish proof in such form as may be required by the Board that he/she maintained a record of steady employment and has supported his/her dependents and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines and restitution as may have been ordered in all criminal cases in which he/she has been convicted.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703782
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7706

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22 TAC §469.12

The Texas State Board of Examiners of Psychologists proposes amendments to rule §469.12, Suspension of Licensure for Failure to Pay Child Support. The amendments are being proposed to make changes to the Board rule in accordance with changes to Chapter 232 of the Family Code made by the 80th Texas Legislature by passage of SB 228.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to help the Board protect the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§469.12. Suspension of Licensure for Failure to Pay Child Support.

(a) - (h) (No change.)

(i) In compliance with Chapter 232, Family Code, upon notice from a child support agency that a licensee has failed to pay child support for six months or more, and requests that the Board refuse to renew the license, the Board will not accept an application for renewal until it is notified by the child support agency that the licensee has met requirements set by law. The Board may charge the licensee a fee for such a denial of renewal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703784
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7706

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CHAPTER 473. FEES

22 TAC §473.1

The Texas State Board of Examiners of Psychologists (Board) proposes amendments to rule §473.1, Application Fees (Not Refundable). The amendments are being proposed to cover the costs of the classified salaries pay increase.

Sherry L. Lee, Executive Director, has determined that, for the first five-year period the proposed amendments will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that, for each year of the first five years the amended rule as proposed is in effect, the public benefit anticipated as a result of enforcing the amended rule will be secure funding adequate to allow the Texas State Board of Examiners of Psychologists to continue its mandated functions of licensing and enforcement. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the rule as proposed will be in direct proportion to the type of licensure application submitted to the Board.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles, or statutes are affected by this amended section as proposed.

§473.1. Application Fees (Not Refundable).

(a) Psychological Associate Licensure--$190 [~~$185~~]

(b) Provisionally Licensed Psychologist--$340 [~~$335~~]

(c) Licensure--$180 [~~$175~~]

(d) Reciprocity--$480 [~~$475~~]

(e) Licensed Specialist in School Psychology--$220 [~~$215~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703786
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7706

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22 TAC §473.3

The Texas State Board of Examiners of Psychologists (Board) proposes amendments to rule §473.3, Annual Renewal Fees (Not Refundable). The amendments are being proposed to cover the cost of the classified salaries pay increase.

Sherry L. Lee, Executive Director, has determined that, for the first five-year period the proposed amendments will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. Lee also has determined that, for each year of the first five years the amended rule as proposed is in effect, the public benefit anticipated as a result of enforcing the amended rule will be secure funding adequate to allow the Texas State Board of Examiners of Psychologists to continue its mandated functions of licensing and enforcement. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the rule as proposed will be in direct proportion to the type of annual renewal submitted to the Board.

Comments on the proposal may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles, or statutes are affected by this amended section as proposed.

§473.3. Annual Renewal Fees (Not Refundable).

(a) Psychological Associate Licensure--$98. [~~$96.~~]

(b) Psychological Associate Licensure over the age of 70--$16.

(c) Provisionally Licensed Psychologist--$93. [~~$91.~~]

(d) Provisionally Licensed Psychologist over the age of 70--$16.

(e) Psychologist Licensure--$189. [~~$187.~~]

(f) Psychologist Licensure over the age of 70--$16.

(g) Psychologist Health Service Provider Status--$20.

(h) Psychologist Health Service Provider status over the age of 70--No Fee.

(i) Licensed Specialist in School Psychology--$41. [~~$39.~~]

(j) Licensed Specialist in School Psychology over the age of 70--$14.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703787
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 305-7706

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 83. PUBLIC HEALTH IMPROVEMENT GRANTS

SUBCHAPTER B. COMMUNITY HOSPITAL CAPITAL IMPROVEMENT FUND

25 TAC §§83.20 - 83.29

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§83.20 - 83.29, concerning the Community Hospital Capital Improvement Fund.

BACKGROUND AND PURPOSE

The repeals are necessary because the funding for the program ended in August 31, 2005. Chapter 83, Subchapter B, pertains to the Community Hospital Capital Improvement Fund, which is a dedicated account in the general revenue fund that originated when the 76th Legislature set aside $25 million of the tobacco settlement monies to create this fund in 1999. The fund, now named the Permanent Hospital Fund for Capital Improvements and the Texas Center for Infectious Disease, is mandated by Government Code, §§403.1066 - 403.1069, which delineates the department's responsibility to provide grants, utilizing the earnings of the fund, to small urban hospitals for capital improvement projects. Eligibility is limited to nonprofit hospitals licensed for 125 or fewer beds and located in counties exceeding 150,000 in population. In 2005, the 79th Texas Legislature appropriated earnings from the fund only to support activities at the Texas Center for Infectious Disease. In 2007, there has been no indication that earnings from the fund will be appropriated for the small urban hospital capital improvements.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 83.20 - 83.29 have been reviewed and the department has determined that reasons for

the rules pertaining to this subject matter no longer exist, and the rules are proposed for repeal.

SECTION-BY-SECTION SUMMARY

The repeals are necessary because the funding for the program ended in August 31, 2005. By not funding the program, it cannot function and rules governing that program are unnecessary.

FISCAL NOTE

Peggy Belcher, Manager, Funds Coordination and Management Branch, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed, as the program will not exist.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

There will be no effect on small businesses or micro-businesses because the program has not existed since fiscal year 2005. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the repeal of the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

The public benefit anticipated as a result of the repeals is a more accurate alignment of the department's rules with the appropriations made by the Texas Legislature.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed repeals do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Peggy Belcher, Grant Coordination and Funds Management Unit, Office of the Chief Financial Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7520 or by email to Peggy.Belcher@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The department's General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed repeals affect the Government Code, Chapter 403. Review of the sections implements Government Code, §2001.039.

§83.20. Purpose.

§83.21. Definitions.

§83.22. Sources and Allocation of Funds.

§83.23. Eligibility for Grants.

§83.24. Requirements for Grants.

§83.25. Procedures for Grant Announcements.

§83.26. Procedures for Grant Applications.

§83.27. Competitive Review Process.

§83.28. Selection Criteria.

§83.29. Project Approval.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 20, 2007.

TRD-200703765
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

CHAPTER 84. PREVENTIVE HEALTH AND HEALTH SERVICES BLOCK GRANT

25 TAC §84.1

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §84.1, concerning the State Preventive Health Advisory Committee.

BACKGROUND AND PURPOSE

The amendment is necessary to update the rule regarding the State Preventive Health Advisory Committee (committee) to reflect the new name of the agency, delete the reference to the Texas Board of Health, and make other minor updates that do not substantially change the rule. The rule is still needed due

to the continued responsibilities for implementing United States Code--Title 42, §300w-4(d) regarding formulation of an annual state plan for the Preventive Health and Health Services Block Grant (PHHSBG).

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 84.1 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

The amendment to §84.1 reflects changes in the agency name, removes references to the now non-existent Texas Board of Health, updates references to include the Executive Commissioner of the Health and Human Services Commission, and identifies the center within the department that is to receive the committee's annual report. The section of the rule regarding abolishing the committee is removed because the committee is a requirement of United States Code--Title 42, §300w-4(d) which requires the formulation of an annual state plan for the PHHSBG.

FISCAL NOTE

Peggy Belcher, Manager, Funds Coordination and Management Branch, has determined that for each year of the first five-year period that the section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the section as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Belcher has also determined that there will be no effect on small businesses or micro-businesses required to comply with the rule as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Ms. Belcher has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated is a clear understanding of the agencies that now have oversight over the committee since the consolidation of the health-related agencies in fiscal year 2005.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendment does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Peggy Belcher, Grant Coordination and Funds Management Unit, Office of the Chief Financial Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7520 or by e-mail to Peggy.Belcher@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendment is authorized by Chapter 2110, which requires state agencies to adopt rules concerning advisory committees; and the Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendment affects Health and Safety Code, Chapter 11. Review of the section implements Government Code, §2001.039.

§84.1. The State Preventive Health Advisory Committee.

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) (No change.)

(2) The committee is established under Health and Safety Code, §11.016, which authorizes the Executive Commissioner of the Health and Human Services Commission [~~Texas Board of Health (board)~~] to establish advisory committees and is required by 42 USC §300w-4.

(b) - (c) (No change.)

(d) Tasks.

(1) The committee shall make recommendations to the [~~Texas~~] Department of State Health Services (department) regarding the development and implementation of a state plan, including recommendations on:

(A) - (E) (No change.)

(2) (No change.)

(e) Committee abolished. The committee may not be abolished unless the department ceases to receive Preventive Health and Health Services Block Grant funds or federal law relating to the block grant is amended to no longer require a committee. The date on which the committee shall be abolished is the date of the occurrence of the earlier of these events. [~~By January 1, 2007, the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or~~

abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.]

(f) Composition. The committee shall be composed of eight members.

(1) (No change.)

(2) The members of the committee shall be appointed by the Executive Commissioner of the Health and Human Services Commission [board] as follows:

(A) (No change.)

(B) five non-consumer members, including the following:

(i) the Commissioner of the department [Health];

(ii) (No change.)

(iii) one department regional [medical] director;

(iv) - (v) (No change.)

(g) (No change.)

(h) Officers.

(1) The Commissioner of the department [Health] serves as the presiding officer of the committee. The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, and cause proper reports to be made to the federal funding agency.

(2) - (4) (No change.)

(i) - (l) (No change.)

(m) Statement by members.

(1) The [board, the] department[,] and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the [board,] department[,] or committee.

(2) The committee and its members may not participate in legislative activity in the name of [the board,] the department[,] or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(3) - (6) (No change.)

(n) Reports to the Center for Consumer and External Affairs (CCEA) [board]. The committee shall file an annual written report with the CCEA [board].

(1) The report shall list the meeting dates of the committee, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee [by the board], the status of any rules which were recommended by the committee [to the board], and anticipated activities of the committee for the next year.

(2) (No change.)

(3) The report shall cover the meetings and activities in the immediately preceding fiscal year and shall be filed with the CCEA [board] each October [January]. The report shall be signed by the commissioner.

(o) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703797
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 97. COMMUNICABLE DISEASES
SUBCHAPTER B. IMMUNIZATION REQUIREMENTS IN TEXAS ELEMENTARY AND SECONDARY SCHOOLS AND INSTITUTIONS OF HIGHER EDUCATION

25 TAC §97.62

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §97.62, concerning the provision of exclusions from compliance with required immunizations.

BACKGROUND AND PURPOSE

Government Code, §2001.039, requires that each state agency review and consider for readoption every four years each rule adopted by that agency pursuant to the Government Code, Chapter 2001. Section 97.62 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

Texas Health and Safety Code, §161.004(d)(1), states that: "A child is exempt from an immunization required by this section if.....a parent, managing conservator, or guardian states that the immunization is being declined for reasons of conscience, including a religious belief." Under the statute, the appropriate form is obtained from the department. Currently under agency rules, a person claiming exclusion for reasons of conscience, including a religious belief, from a required immunization may only obtain the affidavit form by submitting a written request to the department via mail delivery, hand delivery, or by facsimile. There is currently no provision in the rule to authorize requesting the form via the Internet.

The proposed amendment would allow the form to be requested via the Internet. This change would reflect the fact that more and more people are conducting routine business through the Internet. Allowing parents to submit a request for a conscientious objection affidavit form via the department's Internet website would add convenience for the public and would improve the process' efficiency.

The amendment also clarifies that references to a child's guardian in this rule mean a child's legal guardian.

SECTION-BY-SECTION SUMMARY

Amendments to §97.62 update department organizational names and mailing addresses, reorder the text, allow parents or legal guardians to request conscientious objection affidavit

forms for their children via the department's Internet website, insert the parenthetical "(where applicable)" to §97.62(2)(D) to reflect the fact that there will be no physical "request" to return when the Internet request method is used; and clarify that all references in the rule to a child's "guardian" mean a child's "legal guardian."

FISCAL NOTE

Casey S. Blass, Section Director, Disease Prevention and Intervention Section, has determined that for each year of the first five years that the section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the section as proposed other than the increase in efficiency the change would provide for the department.

SMALL AND MICRO-BUSINESS IMPACT

Mr. Blass has also determined that there will be no effect on small businesses or micro-businesses required to comply with the section as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Mr. Blass has determined that for each year of the first five years that the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of enforcing or administering the section as proposed is to allow parents to submit a request for conscientious objection affidavit form via the department's Internet website, thereby providing improved customer service.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposed rules may be submitted to Victoria Brice, Disease Prevention and Intervention Section, Division of Prevention and Preparedness, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7111, extension 6658, or by email to Victoria.Brice@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services, General Counsel, Lisa Hernandez, certifies that the proposed rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendment is authorized by Health and Safety Code, §81.021, which requires the department to protect the public from communicable disease; §81.004 which allows the department to adopt rules for the effective administration of the Communicable Disease Act; §161.004 and §161.0041 which provides for the exemption and the methodology for obtaining it; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendment affects Health and Safety Code, Chapters 81, 826 and 1001; Government Code. Review of the section implements Government Code, §2001.039.

§97.62. Exclusions from Compliance.

Exclusions from compliance are allowable on an individual basis for medical contraindications, reasons of conscience, including a religious belief, and active duty with the armed forces of the United States. Children and students in these categories must submit evidence for exclusion from compliance as specified in the Health and Safety Code, §161.004(d), Health and Safety Code, §161.0041, Education Code, Chapter 38, Education Code, Chapter 51, and the Human Resources Code, Chapter 42.

(1) To claim an exclusion for medical reasons, the child or student must present a statement signed by the child's physician (M.D. or D.O.), duly registered and licensed to practice medicine in the United States who has examined the child, in which it is stated that, in the physician's opinion, the vaccine required is medically contraindicated or poses a significant risk to the health and well-being of the child or any member of the child's household. Unless it is written in the statement that a lifelong condition exists, the exemption statement is valid for only one year from the date signed by the physician.

(2) To claim an exclusion for reasons of conscience, including a religious belief, a signed affidavit must be presented by the child's parent or legal guardian, stating that the child's parent or legal guardian declines vaccinations for reasons of conscience, including because of the person's religious beliefs. The affidavit will be valid for a two-year period. The child, who has not received the required immunizations for reasons of conscience, including religious beliefs, may be excluded from school in times of emergency or epidemic declared by the commissioner of public health.

(A) A person claiming exclusion for reasons of conscience, including a religious belief, from a required immunization may only obtain the affidavit form by submitting a written request to the department. The request must include the following:

(i) full name of child; and

(ii) child's date of birth (month/day/year).[;]

(B) Requests for affidavit forms must be submitted to the department through one of the following methods:

(i) written request through the United States Postal Service (or other commercial carrier) to the department at: DSHS Immunization Branch, Mail code 1946, P.O. Box 149347, Austin, Texas 78714-9347;

(ii) by facsimile at (512) 458-7544;

(iii) by hand-delivery at the department's physical address at 1100 West 49th Street, Austin, Texas 78756; or

(iv) via the department's Immunization program Internet website (go to www.ImmunizeTexas.org).

~~[(B) Written requests must be submitted through the United States Postal Service (or other commercial carrier), by facsimile, or by hand delivery to the department's Bureau of Immunization and Pharmacy Support, 1100 West 49th Street, Austin, Texas 78756.]~~

(C) Upon request, one affidavit form for each child will be mailed unless otherwise specified (shall not exceed a maximum of five forms per child).

(D) The department shall not maintain a record of the names of individuals who request an affidavit and shall return the original request (where applicable) with the forms requested.

(3) To claim an exclusion for armed forces, persons who can prove that they are serving on active duty with the armed forces of the United States are exempted from the requirements in these sections.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 20, 2007.

TRD-200703764
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 98. TEXAS HIV MEDICATION PROGRAM

SUBCHAPTER A. TEXAS HIV STATE PHARMACY ASSISTANCE PROGRAM

25 TAC §§98.1 - 98.13

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes new §§98.1 - 98.13, concerning the Texas HIV State Pharmacy Assistance Program (SPAP).

BACKGROUND AND PURPOSE

The SPAP is designed to assist low income, HIV-positive Texans, who are Medicare Part D beneficiaries and have been denied Medicare's full low-income subsidy towards out-of-pocket expenses related to prescription drugs. On January 1, 2006, the Medicare Modernization Act of 2003 implemented prescription drug coverage for Medicare beneficiaries. Beneficiaries with incomes of 135% of the Federal Poverty level or less were awarded full low income subsidies that provided assistance with Medicare Part D Premiums and all out-of-pocket costs except for $3 - $5 dispensing fees per prescription. Average out-of-pocket costs for beneficiaries who were denied the full low-income subsidies averaged $4,000 - $6,000 per year. Many of these patients found these out-of-pocket costs impossible to pay and consequently began to stop taking their medications. Many of these clients are receiving assistance with some of their medications from the Texas HIV Medication Program (THMP). THMP's formulary is limited and only consists of 43 medications. The THMP receives federal AIDS Drug Assistance money. As a result of this, the assistance that the THMP currently provides does not count toward meeting the client's true out-of-pocket costs and therefore the client does not advance to the Medicare catastrophic coverage portion of the benefit and does not reap any savings. Additionally, the THMP does not reap savings as a result of the client not advancing to the catastrophic coverage benefit.

The department carefully considered the most efficient way to wrap around the Medicare Part D prescription drug benefit for low income, HIV-positive Texans that would maximize the use of existing funds, expand buying power and reduce out-of-pocket costs for clients. The department believes these rules would best serve those purposes.

SECTION-BY-SECTION SUMMARY

New §98.1 provides the purpose of the SPAP; new §98.2 provides definitions for the new subchapter; new §98.3 limits assistance with out-of-pocket costs only associated with the Medicare Prescription drug plan that a client is currently enrolled in; new §98.4 describes the program's nondiscrimination policy; new §98.5 describes the program's eligibility criteria and renewal requirements; new §98.6 covers denial, non-renewal, and termination of benefits; new §98.7 describes the process to apply for services; new §98.8 describes the application submission process; new §98.9 describes residency, and residency documentation, requirements; new §98.10 describes the program's benefits the limitations to those benefits; new §98.11 concerns department contracting; new §98.12 describes the program's appeal process; and new §98.13 concerns confidentiality.

FISCAL NOTE

Casey Blass, Director, Disease Prevention and Intervention Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be fiscal implications to the state as a result of enforcing and administering the sections as proposed. The department is implementing and administering the program using existing resources. The clients who would be enrolled into the new SPAP are currently enrolled in the THMP and currently receiving the program's medication services. These clients would be moved off THMP (reducing THMP expenditures) and onto the SPAP. The rules for the new SPAP have an annual client expenditure cap that is not to exceed the current average cost of providing services for a client on the THMP for 12 months. This ensures that the funds are budget neutral and that there will be no increase in overall expenditures. There would be a shift in expenditures from THMP to SPAP. It is important to note that it's anticipated that the proposed rules would increase the department's buying power, such that more medications could be bought with the same amount of money, thus increasing agency efficiency and improving benefits to our clients at the same time.

There is no anticipated adverse fiscal implications for local governments. The SPAP would allow the department to buy more medications with the same amount of money and also provide better benefits to our clients. This would reduce the health care burden on local governments.

Additionally, there would be a positive fiscal benefit for those individuals eligible for the program by virtue of the benefit provided.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Blass has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the proposed rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Blass has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is a decrease in HIV/AIDS morbidity and mortality and their associated costs as a result of increasing access to medications used to treat HIV disease and its related conditions.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Dwayne Haught, Manager, Texas HIV Medication Program, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189, (512) 533-3006, or dwayne.haught@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §85.003, which requires the department to act as lead agency and primary resource for AIDS and HIV policy; Health and Safety Code, §85.013, which requires the department to maximize the use of federal and private funds for HIV-related treatment; Health and Safety Code, §85.016, which allows for the adoption of rules; Health and Safety Code, §85.061, which establishes the Texas HIV Medication Program; Health and Safety Code, §85.063, which requires the department to establish procedures and eligibility guidelines for the HIV Medication Program; Health and Safety Code, §85.064, which allows the department to accept and use local, state, and federal funds and private donations to fund the program; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new sections affect the Health and Safety Code, Chapters 85 and 1001; and Government Code, Chapter 531.

§98.1. Purpose.

The purpose of this chapter is to establish the Texas HIV State Pharmacy Assistance Program. The program is designed to assist low-income, HIV-infected individuals with out-of-pocket costs associated with Medicare Part D prescription drug plans.

§98.2. Definitions.

These terms, when used in this subchapter, are defined as follows:

(1) AIDS--Acquired immune deficiency syndrome as defined by the Centers for Disease Control and Prevention.

(2) Commissioner--The Commissioner of the Department of State Health Services.

(3) Department--The Department of State Health Services.

(4) HIV--Human immunodeficiency virus infection as defined by the federal Centers for Disease Control and Prevention.

(5) Legally responsible person--A parent, managing conservator, or other person that is legally responsible for the support of a minor, a ward, or himself/herself.

(6) Minor--A person who has not reached his or her 18th birthday and who has not been emancipated by a court or who is not married or recognized as an adult by the State of Texas.

(7) Program--The Texas HIV State Pharmacy Assistance Program.

(8) Out-of-pocket costs--The co-pay, coinsurance and deductible amounts that an individual would be expected to pay when enrolled in a Medicare Part D prescription drug plan.

(9) Recipient--An individual who, under these sections, is determined by the department to be eligible for services.

(10) Texas resident--A person is presumed to be a Texas resident if that person physically resides within the geographic boundaries of the state, with a manifest intent to continue to physically reside within those boundaries. Manifest intent may be evidenced by any relevant information, including: voting records; automobile registration; Texas driver's license or other official identification; enrollment of children in a public or private school; or payment of property tax. The burden of proving intent to reside is on the person requesting assistance.

§98.3. Medication Coverage.

The program may only provide assistance with out-of-pocket costs for medications on the formulary of the Medicare Part D prescription drug plan that an individual is currently enrolled in.

§98.4. Nondiscrimination.

The department operates this program in a manner that allows full participation of individuals regardless of their race, color, national origin,

age or disability. In addition and for purposes of the program, discrimination on the basis of gender or sexual orientation is prohibited.

§98.5. General Eligibility Criteria; Renewal.

(a) A person shall meet all of the following requirements to be eligible for the program:

(1) have a diagnosis of HIV disease certified by a physician licensed in the United States;

(2) be a Medicare beneficiary, enrolled in a Medicare Part D prescription drug plan, and denied the full low-income subsidy Part D assistance by Social Security (information on Medicare eligibility, Medicare Part D prescription drug plans and low income subsidy assistance can be found at http://www.medicare.gov);

(3) have an adjusted gross income of 200% or less of the current Federal Poverty Guidelines (see http://www.aspe.hhs.gov/poverty/);

(4) demonstrated to be a Texas resident as determined within this rule; and not be:

(A) incarcerated in a city, county, state, or federal jail or prison;

(B) admitted or committed to a state facility under the Texas Health and Safety Code; or

(C) eligible for assistance with Medicare Part D prescription drug plan out-of-pocket costs under any other program; and

(5) submit an application for HIV State Pharmacy Assistance Program benefits.

(b) The department may, at any time, verify the eligibility status of an enrolled recipient to determine if the recipient is continuing to meet the eligibility criteria of the program. The recipient must cooperate with the department, and furnish requested documentation to the department as directed.

(c) A recipient must renew enrollment in the program every two years according to the procedures established by the department. Recipient must demonstrate, at that time, continuing eligibility for the HIV State Pharmacy Assistance Program to the satisfaction of the department. Recipients must use the department's renewal application form (which may be obtained from the department calling toll-free 1-(800)-255-1090 or writing to: Department of State Health Services, HIV/STD Comprehensive Services Branch, Texas HIV State Pharmacy Assistance Program, 1100 West 49th Street, Austin, Texas 78756-3199), and comply with all associated deadlines and requirements for accompanying documents.

§98.6. Denial, Non-Renewal, and Termination of Benefits.

A person may be denied enrollment in the program, be denied renewal in the program, and/or have enrollment in the program terminated for any of the following reasons:

(1) failure to maintain Texas residency, or upon demand furnish evidence of such;

(2) failure to continue to meet income requirements for eligibility or to provide income data as requested;

(3) becoming eligible for the full Low Income Subsidy under Medicare Part D;

(4) becoming incarcerated in a city, county, state, or federal jail or prison;

(5) being admitted or committed to a state facility under the Texas Health and Safety Code;

(6) the department determines the individual has made a material misstatement or misrepresentation on their application or any document required to support their application or renewal, or on submissions made to comply with §98.5(b) of this title (relating to General Eligibility Criteria; Renewal);

(7) failure to continue premium payments under Medicare Part D;

(8) failure to enroll in Medicare Part D benefits and apply for the Low Income Subsidy under the Medicare Prescription Drug Improvement and Modernization Act of 2003 (information on Medicare enrollment and applying for the Low Income Subsidy can be found at http://www.medicare.gov);

(9) failure to notify the program of changes to permanent home address or insurance coverage;

(10) the recipient notifies the program in writing that they no longer want to receive program benefits;

(11) the recipient has not requested or used services during any period of six consecutive months; and/or

(12) program funds are exhausted.

§98.7. Applications.

(a) Persons meeting the aforementioned eligibility requirements must submit a complete application for benefits to the department, on the form specified by the department, accompanied by the required supporting documentation. A complete application shall consist of all of the following:

(1) a complete Application for Services, with the original signature of the applicant, or the person legally responsible for the applicant, certifying that the statements made within the application are factual and true;

(2) documentation of current Texas residency;

(3) documentation acceptable to the department to establish the applicant's financial qualifications;

(4) verification that the applicant has been denied the Medicare Part D Full Low Income Subsidy assistance by Social Security;

(5) verification that the applicant has enrolled in a Medicare Part D Prescription Drug Plan that provides prescription services in Texas (Information on enrollment in a Medicare Part D Prescription Drug Plan and the available plans that provide services in Texas can be found at http://www.medicare.gov); and

(6) verification that the applicant has a diagnosis of HIV disease and is under the care of a physician licensed to practice in the United States of America, who prescribes drugs for that person.

(b) Any application that does not meet all of the above requirements is considered incomplete. Incomplete applications will not be processed further, and the applicant will be contacted concerning the insufficiency of the application.

§98.8. Application Process.

(a) To request an application packet, call toll-free 1-(800)-255-1090 or write to: Department of State Health Services, HIV/STD Comprehensive Services Branch, Texas HIV State Pharmacy Assistance Program, 1100 West 49th Street, Austin, Texas 78756-3199.

(b) Submit completed application, along with accompanying documentation and certification forms, to: Department of State Health Services, HIV/STD Comprehensive Services Branch, Texas HIV State Pharmacy Assistance Program, 1100 West 49th Street, Austin, Texas 78756-3199.

(c) The applicant is expected to give informed consent to the department so that the program may contact a medical provider, Medicare, or Medicare prescription drug plan to verify information contained in the application and/or to request additional supporting documentation pertaining to the application.

§98.9. Residency, and Residency Documentation, Requirements.

The applicant must present documentation of Texas residency as specified in this subchapter. Documents that may provide evidence of residency include:

(1) documents issued by the state or federal government, e.g., driver's license or identification card issued by the Texas Department of Public Safety; a motor vehicle registration or automobile registration form; a current Texas voter registration card; or a current benefit award letter (e.g., Social Security, Medicare, Medicaid, Food Stamps) displaying the applicant's Texas residential address; or

(2) documents relating to the applicant's sources of income, both from employment and other benefits (e.g., a recent payroll statement, retirement pension or social security check, or disability check).

§98.10. Limitations and Benefits Provided.

(a) Benefits payable by the program to recipients are as follows:

(1) Limited Medicare Part D out-of-pocket expenses, which include deductibles, co-pays and co-insurance amounts. To qualify for this benefit, recipients:

(A) cannot be eligible for the full Low Income Subsidy from Medicare, covering full premium, deductible and co-insurance amounts; and

(B) shall apply and be accepted for Medicare Part D benefits.

(2) The program will pay covered services up to a maximum annual allowable amount per recipient, based upon available funds. The annual allowable amount of covered services per recipient is not to exceed the total of the Texas HIV Medications Program's average monthly individual recipient cost for medications times 12 months (as calculated by the department).

(b) The Texas HIV State Pharmacy Assistance Program is the payor of last resort. All available third parties must be billed prior to the program.

(c) If budgetary limitations exist, the department may (at its sole discretion):

(1) restrict or categorize covered services. Categories will be prioritized based upon medical necessity, other third party eligibility and projected third party payments for the different treatment modalities, caseloads, and demands for services. Caseloads and demands for services may be based on current and/or projected data. In the event covered services must be reduced, they will be reduced in a manner that takes into consideration medical necessity and other third party coverage. The department may change covered services by adding or deleting specific services, entire categories or by making changes proportionally across a category or categories, or by a combination of these methods; and/or

(2) establish a waiting list of eligible applicants. Appropriate information will be collected from each applicant who is placed on a waiting list. The information will be used to facilitate contacting the applicant when benefits become available and to allow efficient enrollment application processing should the budgetary limitations loosen.

§98.11. Provision of Service.

The department may contract with a claims processor to interface with Medicare Part D plans on behalf of the program.

§98.12. Appeal Procedures and Exceptions.

(a) An applicant whose application for initial benefits (or renewal application) is denied, or whose services have been terminated by the department, may appeal the program's decision. An applicant, recipient or person legally responsible for an applicant or recipient may initiate the appeal process by notifying the department's HIV/STD Comprehensive Services Branch that the person wishes to dispute the program's decision. The written notice must contain all arguments and supporting documents being put forward by the individual in question for the appeal. The notice should be addressed to the Department of State Health Services, HIV/STD Comprehensive Services Branch, 1100 West 49th Street, Austin, Texas, 78756-3199.

(b) A department review panel will hear the appeal. The panel shall consist of the Health Promotion Unit Manager; the HIV/STD Comprehensive Services Branch Manager; the Texas HIV Medication Program Manager, and the HIV/STD Comprehensive Services Medical Officer (or equivalent positions, in the event of an agency reorganization). The appellant may present the case in person before the panel, or rely on the written submissions, but in either event the issues on appeal and the arguments in support of those issues are limited to those already submitted in writing. Following review of the materials, and hearing from the individual in person (if applicable), the panel will issue a written decision. The panel's decision shall be final.

(c) The department is not required to offer an opportunity to dispute the decision to deny, non-renew or terminate if the department's actions are the result of the exhaustion of program funds.

§98.13. Confidentiality.

(a) No information that could identify an individual applicant will be released except as authorized by law and in accord with §1.501 of this title (relating to Privacy of Health Information). Applicants are advised that, in addition to the department, their physician(s), pharmacist(s), and designated Medicare Part D prescription drug plan will be aware of their diagnosis.

(b) The department may use or disclose individual health information to provide, coordinate, or manage health care or related services, as allowed by law. This includes referring the recipient to other health care resources. The department may contact a program applicant or recipient to discuss enrollment benefits, resources for treatment, or other health-related information as appropriate.

(c) An individual may request a copy of the department's privacy notice by writing to: Department of State Health Services, Privacy Officer, 1100 West 49th Street, Austin, Texas 78756. More information pertaining to the Health Insurance and Portability and Accountability Act (HIPPA) is available online from the department at the following URL: http://www.dshs.state.tx.us/hipaa.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703852
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. TEXAS HIV MEDICATION PROGRAM

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§98.101 - 98.115, 98.117 - 98.119 and 98.121, concerning the Texas HIV Medication Program.

BACKGROUND AND PURPOSE

The amendments are proposed to update, clarify, and improve the efficiency and accountability of the Texas HIV Medication Program, which was established under Texas Health and Safety Code, Title II, Chapter 85, Subchapter C.

Also, Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency every four years, pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 98.101 - 98.115, 98.117 - 98.119 and 98.121 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. The proposed changes should improve the efficiency and accountability of the program, as well as improve the clarity and readability of the rules themselves.

SECTION-BY-SECTION SUMMARY

Amendments to §98.101 would overtly state that HIV-infected individuals may directly request assistance; changes to this section would also clarify that the medications which can be requested are based on the program formulary (created under the authority of Texas Health and Safety Code, §85.061) and for clarity, deletes a redundant reference to the Health and Safety Code.

Amendments to §98.102 would revise text for clarity, update legacy agency references, delete the definition for "services" as unnecessary, delete the definition of "client" and add a definition for "recipient" to more accurately reflect the relationship between the agency and the individual, clarify the definition of a "Texas resident," and identify the Centers for Disease Control and Prevention as a federal agency.

Amendments to §98.103 would update legacy agency references, and update the Internet address for the program's website.

Amendments to §98.104 would revise text to describe covered classes in the most legally appropriate manner.

Amendments to §98.105 would revise text as necessary for clarity.

Amendments to §98.106 would revise text as necessary for clarity.

Amendments to §98.107 would update legacy agency references, improve readability, and facilitate portability within the limits of Texas' eligibility requirements.

Amendments to §98.108 would revise text to clarify the list of documents the applicant could provide to verify Texas residency, and would also delete paragraphs (3) and (4), since that subject matter would be covered by the new §98.110(a)(1)(A) and §98.110(f).

Amendments to §98.109 would clarify the formula for adjusting annual gross income, and would be consistent with federal grant conditions regarding frequency of eligibility verifications; proposed changes would also change references from client to recipient.

Amendments to §98.110 would update the section title to reflect new proposed content; add a new subsection (a) to establish what constitutes a complete application, and would add a new subsection (b) to state how incomplete applications will be handled; would update legacy agency references, correct the website address for accessing a program application; further changes in this section, designed to increase accountability, would expressly state that the program may at any time require a recipient to verify eligibility status, and would also require renewal every three years.

Amendments to §98.111 would clarify the program would disclose confidential information only as allowed by law; clarify terms by replacing client with applicant or recipient; update legacy agency references, and correct the website address for accessing HIPAA information.

Amendments to §98.112 would update legacy agency references, and would add a reference to Medicare on the list of third party payors, because, as of January 1, 2006, federal Medicare insurance implemented prescription drug coverage; and clarify terms by replacing clients with recipients.

Amendments to §98.113 would revise the rule title for clarity.

Amendments to §98.114 would revise text to clarify how prescription fees are paid for Medicaid clients.

Amendments to §98.115(a) would clarify how the program calculates costs and revenue, while changes to §98.115(b) propose that the analysis of program expenditures be changed to a quarterly, as opposed to a monthly, basis to better allow cost trends to manifest themselves; changes to §98.115(c) propose to delete unnecessary language and adds a website reference, and amendments to §98.115(d) would clarify terms by replacing clients with recipients.

Amendments to §98.117 would update the title to include non-renewal, would help ensure accountability in the eligibility process by making sure only those clients who are truly eligible receive program benefits; also, proposed changes would prevent double-dipping by incarcerated patients who are already receiving that care, and would clarify terms by replacing client with applicant or recipient.

Amendments to §98.118 update legacy agency references and legacy agency positions; amendments to this section would also clarify language regarding appeals by fully outlining who can appeal, all steps in the process and the limitations to the appeal process; proposed changes would also delete language regarding open records since the Public Information Act itself, in conjunction with statutory confidentiality provisions, will determine whether documents associated with an individual appeal are subject to disclosure.

Amendments to §98.119 would clarify terms by replacing client with recipient, and would revise text for clarity.

Amendments to §98.121 update legacy references, delineate responsibilities within the advisory board between the Commissioner of the department and the Executive Commissioner of the Health and Human Services Commission upon dissolution of the Board of Health, revise text for clarity, delete timeframes for approval of meeting minutes, delete term limitations for presiding officer and assistant presiding officer, simplify language prohibit-

ing compensatory per diem and simplify language to clarify which committee members are eligible for travel reimbursement.

FISCAL NOTE

Casey S. Blass, Director, Disease Intervention and Prevention Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed. The proposed amendments are designed to improve program efficiency and accountability and should have a positive impact on the state program on the provision of services.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Blass has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Blass has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is that the program can continue to provide life-sustaining medications to HIV positive needy Texans.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Todd Logan, HIV/STD Comprehensive Services Branch, Health Promotion Unit, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512)-533-3098 or by e-mail to todd.logan@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

DIVISION 1. GENERAL PROVISIONS

25 TAC §§98.101 - 98.115, 98.117 - 98.119

STATUTORY AUTHORITY

The proposed amendments are authorized by Health and Safety Code, Chapter 85, which requires the department to implement the HIV Medications Program; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed amendments affect the Health and Safety Code, Chapters 85 and 1001; and Government Code, Chapter 531.

§98.101. Purpose.

This subchapter establishes procedures and eligibility guidelines for the Texas HIV Medication Program (program) as required in the Health and Safety Code, §85.063. The program is designed to provide [~~, established under the authority of the Health and Safety Code, Chapter 85, Subchapter C, HIV Medication Program, provides~~] prescription drugs to low-income individuals with HIV disease. Hospital districts, local health departments, public or nonprofit hospitals and clinics, [~~and~~] nonprofit community organizations and HIV-infected individuals may request assistance from the program with obtaining [~~public health pricing for~~] medications on the program formulary used in the treatment of [~~to treat individuals with~~] HIV disease.

§98.102. Definitions.

These [~~The following words and~~] terms, when used in this subchapter, are defined as follows: [~~shall have the following meanings, unless the context clearly indicates otherwise.~~]

(1) AIDS--Acquired immune deficiency syndrome as defined by the federal Centers for Disease Control and Prevention.

(2) Council [~~Board~~]--The [~~Texas~~] Department of State [~~Board of~~] Health Services Council.

[~~(3) Client--An individual who, under these sections, is determined by a program to be eligible for services.~~]

(3) [~~(4)~~] Commissioner--The Commissioner [~~commissioner~~] of the Department of State Health Services [~~health~~].

(4) [~~(5)~~] Department--The [~~Texas~~] Department of State Health Services.

(5) [~~(6)~~] Eligible Metropolitan Area--A metropolitan area that is eligible to receive direct federal funding as defined in 42 U.S.C. 300ff-17.

(6) Executive Commissioner--The Executive Commissioner of the Health and Human Services Commission.

(7) HIV--Human immunodeficiency virus infection as defined by the federal Centers for Disease Control and Prevention.

(8) - (10) (No change.)

(11) Recipient--An individual who, under these sections, is determined by the department to be eligible for services. [~~Services--Activities determined by the department as appropriate to carry out the intent of, Health and Safety Code, Chapter 85, Subchapter C.~~]

(12) Texas resident--A person is presumed to be a Texas resident if that person [An individual who] physically resides within the geographic boundaries of the state, with a manifest intent to continue to physically reside within those boundaries. Manifest intent may be evidenced by any relevant information, including: voting records; automobile registration; Texas driver's license or other official identification; enrollment of children in a public or private school; or payment of property tax. The burden of proving intent to reside is on the person requesting assistance.

§98.103. Medication Coverage.

(a) - (b) (No change.)

(c) A list of the approved medications and specific eligibility criteria for them may be obtained from the [Texas] Department of State Health Services, HIV/STD Comprehensive Services Branch [Bureau of HIV and STD Prevention], Texas HIV Medication Program, 1100 West 49th Street, Austin, Texas 78756-3199 or on the program's website at: http://www.dshs.state.tx.us/hivstd/meds/ [http://www.tdh.state.tx.us/hivstd/meds/document.htm].

§98.104. Nondiscrimination.

The department operates this program in a manner that allows full participation of individuals regardless of their race, color, national origin, age or disability [handicapping conditions]. In addition and for purposes of the program, discrimination on the basis of gender or sexual orientation is prohibited.

§98.105. Program Priority.

The department shall give priority to participation in the program to eligible women and infants[,] and to children below the age of 18 as specified in 42 U.S.C. 300ff-21, and Health and Safety Code §85.062.

§98.106. General Eligibility Criteria.

A person is eligible to participate in the program if the person [applying to the program]:

(1) - (5) (No change.)

§98.107. Medical Eligibility Criteria.

(a) A person is medically eligible to participate in the program if the person applying to the program:

(1) provides evidence that the applicant has a diagnosis of HIV disease from a licensed physician [of HIV disease]; and

(2) is under the care of a physician licensed to practice medicine within the United States of America [in Texas] who prescribes the medications for that person.

(b) Exceptions to the Medical Eligibility Criteria can be made at the discretion of the Director [Chief] of the Health Promotions Unit [Bureau of HIV and STD Prevention].

§98.108. Residency Eligibility Criteria.

The applicant [program requires and the client] must present documentation of Texas residency as specified in §§98.101 - 98.115 and §§98.117 - 98.119 of this title [during the program's review of the client's application for services]. Documents that may provide evidence of residency include:

(1) documents issued by the state or federal government, e.g., driver's license or identification card issued by the Texas Department of Public Safety; a motor vehicle registration or automobile registration form; a current Texas voter registration card; or a current benefit award letter (e.g., Social Security, Medicare, Medicaid, Temporary Assistance for Needy Families, or Food Stamps) displaying the applicant's Texas residential address; and/or [Texas Medicaid card;]

(2) documents relating to the applicant's sources of income, both from employment and other benefits, e.g., a recent payroll check; retirement pension or social security check; or disability check.[;]

[(3) all documents must be in the name of the applicant unless the applicant is a dependent minor or a ward. In that event, the documents may be in the name of the legally responsible person; and]

[(4) the program may verify residency periodically during the receipt of services and if requested by the program, a client must provide additional documentation.]

§98.109. Financial Eligibility Criteria.

(a) (No change.)

(b) Formula for adjusting annual gross income.

(1) An applicant's annual gross income (if single), or the combined annual gross income of the applicant and his or her spouse, minus the program's annualized cost of the prescribed medication(s).

(2) For a minor child, the (combined) annual gross income of the child's parent(s), minus the program's annualized cost of the prescribed medication(s). Only the income of the parent(s) living in the same household as the child at the time of application or recertification will be used to determine financial eligibility.

(3) (No change.)

(c) The department shall periodically [annually] verify the financial status of a recipient [an enrolled client] to determine if the recipient continues [client is continuing] to meet the financial eligibility criteria of the program.

§98.110. Application Process; Verification; Renewal.

(a) Persons meeting the aforementioned eligibility requirements must submit a complete application for benefits to the department, on the form specified by the department, accompanied by the required supporting documentation. A complete application shall consist of all of the following:

(1) a complete Application for Services, with the original signature of the applicant, or the person legally responsible for the applicant, certifying that the statements made within the application are factual and true;

(2) documentation of current Texas residency;

(3) documentation acceptable to the department to establish the applicant's financial qualifications;

(4) verification that the applicant has a diagnosis of HIV disease and is under the care of a physician licensed to practice medicine in the United States of America, who prescribes drugs for that person.

(b) Any application that does not meet all of the above requirements is considered incomplete. Incomplete applications will not be processed further, and the applicant will be contacted concerning the insufficiency of the application.

(c) [(a)] To request an application packet, call toll-free 1-800-255-1090 or write to: [Texas] Department of State Health Services, HIV/STD Comprehensive Services Branch, [Bureau of HIV and STD Prevention,] Texas HIV Medication Program, 1100 West 49th Street, Austin, Texas 78756-3199. The program's [client] application for assistance is also available online

at the following URL: http://www.dshs.state.tx.us/hivstd/meds/ [~~http://www.tdh.state.tx.us/hivstd/meds/document.htm~~].

(d) [~~(b)~~] Submit completed application, [~~applications~~] along with accompanying documentation and certification forms, to: [~~Texas~~] Department of State Health Services, HIV/STD Comprehensive Services Branch, [~~Bureau of HIV and STD Prevention,~~] Texas HIV Medication Program, 1100 West 49th Street, Austin, Texas 78756-3199.

(e) [~~(c)~~] The applicant is expected to give informed consent to the department so that the program may contact a [~~an applicant, client, or~~] medical provider, Medicare, or Medicare prescription drug plan to verify information contained in the application and/or to request additional supporting documentation pertaining to the application [~~for enrollment or recertification purposes~~].

(f) The department may, at any time, verify the eligibility status of an enrolled recipient to determine if the recipient is continuing to meet the eligibility criteria of the program. The recipient must cooperate with the department, and furnish requested documentation to the department as directed.

(g) A recipient must renew enrollment in the program every three years according to the procedures established by the department. Recipient must demonstrate, at that time, continuing eligibility for the program to the satisfaction of the department. Recipients must use the department's renewal application form (which may be obtained from the department calling toll-free 1-800-255-1090 or writing to: Department of State Health Services, HIV/STD Comprehensive Services Branch, Texas HIV Medication Program, 1100 West 49th Street, Austin, Texas 78756-3199), and comply with all associated deadlines and requirements for accompanying documents.

§98.111. Confidentiality.

(a) (No change.)

(b) The department may use or disclose individual health information to provide, coordinate, or manage health care or related services, as allowed by law. This includes referring the recipient [~~client~~] to other health care resources. The department may contact a program applicant or recipient [~~participant~~] to discuss enrollment benefits, resources for treatment, or other health-related information as appropriate [~~necessary~~].

(c) An individual may request a copy of the department's privacy notice by writing to: [~~Texas~~] Department of State Health Services, Privacy Officer, 1100 West 49th Street, Austin, Texas 78756. More information pertaining to the Health Insurance and Portability and Accountability Act (HIPPA) is available online from the department at the following URL: http://www.dshs.state.tx.us/hipaa [~~http://www.tdh.state.tx.us/hipaa/default.htm~~].

§98.112. Program Distribution of Medications.

(a) The department will contract with a pharmaceutical wholesaler for purchase of drugs. The [~~Texas~~] Department of State Health Services[~~,~~] Pharmacy [~~Division,~~] will distribute drugs to pharmacies participating in the program and a mail order pharmaceutical distributor for the dispensing of drugs directly to recipients [~~clients~~] who reside outside areas covered by participating pharmacies.

(b) Program funds must be used as payor of last resort and coordinated with other local, state, and federal funds, including Medicaid and Medicare.

§98.113. Participating Pharmacies [~~Pharmacy~~].

The program will only deliver services through pharmacies approved by the program that have signed a Memorandum of Agreement with the department.

§98.114. Prescription Fees.

A dispensing fee may be collected by a participating pharmacy for each prescription dispensed in accordance with the existing Memorandum of Agreement with the department. Program recipients concurrently approved for Medicaid [~~clients~~] will have their specific dispensing fees covered via a periodic lump sum payment generated [~~paid for~~] by the program for payment to the pharmacies.

§98.115. Fiscal Planning.

(a) To ensure the program's expenditures do not exceed the program's budget, the department will analyze the latest actuarial projections for the upcoming year, including the average annual cost per recipient and the projected number of recipients the program will be able to serve using current budget figures [~~program expenditures as follows~~].

[~~(1) Determine the annual average client cost using program expenditures from the previous 12 months. The annual average client cost is calculated by dividing the total amount of funds expended during a 12-month period into the total number of clients served during the same 12-month period.~~]

[~~(2) Project the number of clients that may be served during the next 12-month period using current budget figures. The projected number of clients that may be served is calculated by dividing the program's total available dollars by the annual average client cost derived from paragraph (1) of this subsection.~~]

(b) The department will perform this [~~an~~] analysis of program expenditures every quarter [~~month using the methodology in subsection (a) of this section~~] to determine if funds are sufficient to meet projected expenditures.

(c) To make certain [~~insure~~] that expenditures do not exceed the program's budget, the department may implement the following temporary cost-containment measures as necessary.

(1) Cost-containment measures may be implemented in the following order.

(A) Initiate medical criteria to meet at minimum the most recent federal [~~Federal~~] Department of Health and Human Services Guidelines for the Use of Antiretroviral Agents in HIV-Infected Adults and Adolescents, which can be found at http://aidsinfo.nih.gov/Guidelines. [~~Present medical criteria is a CD4+T-cell count at or below 350 cells per cubic millimeter and/or an HIV viral load greater than 30,000 copies per milliliter when using the branched DNA test or more than 55,000 copies per milliliter when using the RT-PCR test.~~]

(B) Discontinue using the formula for adjusting the applicant's [~~clients'~~] gross annual income described in §98.109(b) of this title (relating to Financial Eligibility Criteria.)

(C) (No change.)

(D) Cease enrollment of new applicants [~~clients~~].

(2) (No change.)

(d) Cost-containment measures, if implemented, will be applied to recipients[~~clients~~] enrolling after the cost-containment measure(s) is implemented.

§98.117. Denial, Non-Renewal, and [~~of Application or~~] Termination of [~~Client~~] Benefits.

(a) A person may be denied enrollment in the program, be denied renewal in the program, and/or have enrollment in the program [~~Individuals already receiving services will have their application denied or services~~] terminated [~~only~~] for any [~~one or more~~] of the following reasons: [~~.~~]

(1) failure to maintain Texas residency, or upon demand furnish evidence of such; [Services will be denied or terminated if:]

[(A) the person is not a resident of the state as required in §98.108 of this title (relating to Residency Eligibility Criteria);]

[(B) the annual gross income does not meet the criteria set in §98.109 of this title (relating to Financial Eligibility Criteria);]

[(C) the person does not provide evidence to meet the criteria set in §98.107 of this title (relating to Medical Eligibility Criteria); or]

[(D) the client notifies the program in writing that he/she no longer wants to receive services.]

(2) failure to continue to meet income requirements for eligibility or to provide income data as requested; [Services may be terminated if:]

[(A) the applicant or client submits an application form or any document required in support of the application which contains a misstatement of fact which is material to determining program eligibility;]

[(B) the client submits false claims to a participating pharmacy];

[(C) the client has not requested or used services during any period of six consecutive months;]

[(D) program funds are exhausted.]

(3) failure to initially meet or continue to meet the medical requirements for eligibility listed in §98.107 of this title (relating to Medical Eligibility Criteria);

(4) becoming eligible for the full Low Income Subsidy under Medicare Part D;

(5) becoming incarcerated in a city, county, state, or federal jail or prison;

(6) being admitted or committed to a state facility under the Texas Health and Safety Code;

(7) the department determines the individual has made a material misstatement or misrepresentation on their application or any document required to support their application or renewal, or on submissions made to comply with §98.110(f) of this title (relating to Application Process; Verification; Renewal);

(8) failure to notify the program of changes to permanent home address or insurance coverage;

(9) the recipient notifies the program in writing that he/she no longer wants to receive program benefits;

(10) the recipient has not requested or used services during any period of six consecutive months; and/or

(11) program funds are exhausted.

(b) Denial, modification, suspension, or termination of services to an applicant or recipient [a client] will be governed by the procedures required by §98.118 of this title (relating to Appeal Procedures), and §98.119 of this title (relating to Exceptions from Appeal Procedures).

§98.118. Appeal Procedures.

(a) An applicant whose application for initial benefits (or renewal application) is denied, or whose services have been terminated by the department, may appeal the program's decision. An applicant, recipient or person legally responsible for an applicant or recipient, may initiate the appeal process by notifying the department's HIV/STD Comprehensive Services Branch that the person wishes to dispute the program's decision [A person may initiate the appeal process by notifying the department's Bureau of HIV and STD Prevention that the person wishes to dispute the program's decision concerning either eligibility or funding]. The written notice must contain all arguments and supporting documents being put forward by the individual in question [sufficient reasons] for the appeal. The notice should be addressed to the [Texas] Department of State Health Services, HIV/STD Comprehensive Services Branch [Bureau of HIV and STD Prevention], 1100 West 49th Street, Austin, Texas, 78756-3199.

(b) A department review panel will hear the appeal. The panel shall consist of the Health Promotion Unit Manager [Chief, Bureau of HIV and STD Prevention]; the HIV/STD Comprehensive Services Branch Manager [the Director, HIV/STD Clinical Resources Division]; [and] the [Program Manager,] Texas HIV Medication Program Manager, and the HIV/STD Comprehensive Services Medical Officer (or equivalent positions, in the event of an agency reorganization) [Chief, Bureau of Communicable Disease Prevention and Control]. The appellant [appellant(s)] may present the case in person before the panel, or rely on the written submissions, but in either event the issues on appeal and the arguments in support of those issues are limited to those already submitted in writing. Following review of the materials, and hearing from the individual person (if applicable)[. After hearing all testimony], the panel will issue a written decision. The panel's decision shall be final.

[(c) Written complaints are subject to the Open Records Act, Government Code, Chapter 552.]

§98.119. Exceptions from Appeal Procedures.

The department is not required to offer an opportunity to dispute the decision to deny or terminate recipient [client] status if the department's actions are the result of [from] the exhaustion of funds [appropriated to the department for purposes authorized under Health and Safety Code, Chapter 85, Subchapter C, Texas HIV Medication Program].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703896
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

DIVISION 2. ADVISORY COMMITTEE

25 TAC §98.121

STATUTORY AUTHORITY

The proposed amendment is authorized by Health and Safety Code, Chapter 85, which requires the department to implement the HIV Medications Program; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and

Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed amendment affects the Health and Safety Code, Chapters 85 and 1001; and Government Code, Chapter 531.

§98.121. Texas HIV Medication Advisory Committee.

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) The name of the committee shall be the Texas HIV Medication Advisory Committee (committee).

(2) Texas Health and Safety Code, §85.066, allows the Executive Commissioner of the Texas Health and Human Services Commission (executive commissioner) [~~Board of Health (board)~~] to establish the committee.

(b) (No change.)

(c) Purpose. The purpose of the committee is to advise [~~assist~~] the executive commissioner [~~board~~] and the Texas Department of State Health Services (department) in the development of procedures and guidelines for the Texas HIV Medication Program (program).

(d) Tasks. The committee shall:

(1) review the goals and aims [~~targets~~] of the program;

(2) - (3) (No change.)

(4) carry out any other tasks given to the committee by the executive commissioner [~~board~~].

(e) Committee abolished. By March 1, 2008, the executive commissioner [~~board~~] will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition. The committee shall be composed of 11 members appointed by the executive commissioner as follows:

(1) - (2) (No change.)

(3) four consumer members [~~persons~~] who must be diagnosed as HIV positive;

(4) - (5) (No change.)

(6) one pharmacist who participates in the Texas HIV Medication Program.

(g) Terms of office. The term of office of each member shall be six years. Members shall serve after expiration of their term until a replacement is appointed.

(1) (No change.)

(2) If a vacancy occurs, a person may [~~shall~~] be appointed to serve the unexpired portion of that term.

(h) Officers. The committee shall select from its members the presiding officer and an assistant presiding officer to begin serving on March 1 of each odd-numbered year.

(1) Each officer shall serve until February 27th of each odd-numbered year. Each officer may holdover until his or her replacement is elected.

(2) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper annual reports to be made to the Commissioner of the Department of State Health Services (commissioner) [~~board~~]. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(3) - (4) (No change.)

[~~(5) A member shall serve no more than two consecutive terms as presiding officer and/or assistant presiding officer.~~]

(5) [~~(6)~~] The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(i) (No change.)

(j) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which they are assigned.

(1) - (3) (No change.)

(4) The attendance records of the members shall be reported in the annual report to the commissioner [~~board~~]. The report shall include attendance at committee and subcommittee meetings.

(k) (No change.)

(l) Procedures. Robert's Rules of Order, Newly Revised shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) - (4) (No change.)

(5) Minutes of each committee meeting shall be taken by department staff.

[~~(A) A draft of the minutes approved by the presiding officer shall be provided to the board and each member of the committee within 30 days of each meeting.~~]

[~~(B)~~] After approval by the committee, the minutes shall be signed by the presiding officer.

(m) (No change.)

(n) Statements by members.

(1) The executive commissioner [~~board~~], the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the executive commissioner [~~board~~], department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the executive commissioner [~~board~~], the department, or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(3) - (6) (No change.)

(o) Reports [~~to board~~]. The committee shall file an annual written report with the commissioner [~~board~~].

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished any specific [~~the~~] tasks officially given to the committee [~~by the board~~], the status of any rules which were recommended by the committee [~~to the board~~], and anticipated activities of the committee for the next year.

(2) (No change.)

(3) The report shall cover the meetings and activities in the immediate preceding 12 months and shall be filed with the commis-

sioner [~~board~~] each March. It shall be signed by the presiding officer and appropriate department staff.

(p) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

(1) No salary or stipend [~~compensatory per diem~~] shall be paid to committee members unless required by law.

(2) A committee member who is an employee of a state agency, other than the department, may not receive reimbursement for expenses from the department.

(3) A nonmember of the committee who is appointed to serve on a subcommittee may not receive reimbursement for expenses from the department.

(4) Only HIV-positive consumer committee members shall be eligible for reimbursement of actual travel expenses incurred. Each member who is eligible to be reimbursed for expenses shall submit to staff the member's receipts for expenses and any required official forms no later than 14 days after each committee meeting.

(5) Requests for reimbursement of expenses shall be made on official state travel vouchers prepared by department staff.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703897
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 102. DISTRIBUTION OF TOBACCO SETTLEMENT PROCEEDS TO POLITICAL SUBDIVISIONS

25 TAC §§102.1 - 102.5

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§102.1 - 102.5, concerning the distribution of tobacco settlement proceeds to political subdivisions.

BACKGROUND AND PURPOSE

The proposed amendments are necessary to update the name of the agency, remove references to the former Board of Health, and make other minor text changes. The rules are still needed due to the continued responsibilities for implementing the Health and Safety Code, §§12.131 - 12.139, and the responsibilities of the department under the Agreement Regarding Disposition of Tobacco Settlement Proceeds filed on July 24, 1998, in United States District Court, Eastern District of Texas, in the case styled The State of Texas v. The American Tobacco Co., et al, No. 5-96CV-91.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 102.1 - 102.5 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The proposed amendments to §§102.1, 102.2, and 102.5 reflect changes in the agency name, remove references to the Texas Board of Health, and update references to include the Executive Commissioner of the Health and Human Services Commission. The proposed amendment to §102.3 adds text to include two more examples for which expenditures may or may not be counted as annual claims by a county that is not wholly within a hospital district. The proposed amendment to §102.4 adds the text "or other supporting documentation" to the list of documents that a political subdivision being audited shall make available to the department or its contractor. The additional proposed amendment to §102.5 authorizes the hearing examiner to have the authority to make findings of an overstatement of expenditures discovered after an audit.

FISCAL NOTE

Peggy Belcher, Manager, Funds Coordination and Management Branch, has determined that, for each year of the first five-year period that the amended sections as proposed will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Belcher has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the amended sections as proposed. There are no anticipated economic costs to persons who are required to comply with the amended sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Belcher has also determined that, for each year of the first five years the amended sections as proposed are in effect, the public will benefit from adoption of the amended sections. The public benefit anticipated is a clear understanding of the agencies that now have oversight over the distribution of the tobacco proceeds since the consolidation of the health-related agencies in Fiscal Year 2005. Also, there is additional information for the public regarding the disbursements of the funds.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to

protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Peggy Belcher, Grant Coordination and Funds Management Unit, Office of the Chief Financial Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7520 or by e-mail to Peggy.Belcher@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendments are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the sections implements Government Code, §2001.039.

The proposed amendments affect Health and Safety Code, Chapters 12 and 1001 and Government Code, Chapter 531.

§102.1. General.

(a) This chapter implements the Health and Safety Code, §§12.131 - 12.139 and the responsibilities of the [~~Texas~~] Department of State Health Services (department) under the Agreement Regarding Disposition of Tobacco Settlement Proceeds (agreement) filed on July 24, 1998, in United States District Court, Eastern District of Texas, in the case styled The State of Texas v. The American Tobacco Co., et al., No. 5-96CV-91. The term "agreement" includes the subsequent Clarification of Agreement Regarding Disposition of Settlement Proceeds filed on July 24, 1998, in that litigation.

(b) (No change.)

§102.2. Distributions.

(a) A political subdivision may receive a pro rata share of the annual distribution by the Comptroller of Public Accounts (comptroller) under the agreement. The [~~Texas~~] Department of State Health Services (department) will certify to the comptroller the percentage of the annual distribution that each political subdivision is eligible to receive. The comptroller is responsible for transmitting the payments to the eligible political subdivisions.

(b) - (c) (No change.)

§102.3. Annual Claims.

(a) (No change.)

(b) Counties not wholly within a hospital district. For a county not wholly within a hospital district, the agreement further states that unreimbursed expenditures are to be calculated as "all unreimbursed amounts, including unreimbursed jail health care, expended by such county for health care services to the general public during that year, plus 15% of that total."

(1) The following are examples for which expenditures, if unreimbursed, may be counted:

(A) - (F) (No change.)

(G) behavioral health care services, including a physician examination to determine if an individual is in need of mental health care;

(H) - (L) (No change.)

(2) The following are examples for which expenditures may not be counted:

(A) - (E) (No change.)

(F) court procedures such as continued mental health commitments and medication hearings;

(G) [~~(F)~~] the amount of a tax abatement given in exchange for an agreement to provide health care services;

(H) [~~(G)~~] regulatory activities such as restaurant inspection;

(I) [~~(H)~~] 911 services;

(J) [~~(I)~~] first responder services; and

(K) [~~(J)~~] services to the extent to which the county has received reimbursement or funds through federal or state programs including, but not limited to, county indigent health care, tertiary medical care, emergency medical services grants, permanent fund for children and public health grants, public health block grants, Title XVIII of the Social Security Act (Medicare), Title XIX of the Social Security Act (Medicaid), or crime victims compensation fund.

(3) (No change.)

(c) - (f) (No change.)

§102.4. Regular Audits [~~audits~~].

(a) - (c) (No change.)

(d) A regular audit may include a review of any audit or financial statement of the political subdivision performed by persons other than the department. A political subdivision being audited by the department shall make available to the department or its contractor such an audit, [~~or~~] financial statement, or other supporting documentation at the department's or its contractor's request.

§102.5. Disputes.

(a) - (h) (No change.)

(i) If after a hearing the department's hearing examiner, on behalf of the Executive Commissioner of the Health and Human Services Commission [~~Board of Health~~], finds an overstatement, the findings shall be considered final and reported to the comptroller. This section delegates to the hearing examiner authority to make findings under this section.

(j) - (m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703843

Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 103. INJURY PREVENTION AND CONTROL

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§103.1 - 103.24, and new §§103.1 - 103.8, concerning injury prevention and control.

BACKGROUND AND PURPOSE

The repeal and new sections are necessary to comply with Health and Safety Code, Chapter 92. The repeal and new sections will enable the reporting sources to more clearly identify the timeframes and conditions that must be reported, define the minimal reportable information on these conditions, and describe the procedures for reporting. The new sections also add language necessary to administer other provisions of this subchapter; specifically, the investigation and control of reportable conditions.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 103.1 - 103.24 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are necessary.

SECTION-BY-SECTION SUMMARY

Sections 103.1 - 103.9 are being repealed because the rules expired on December 31, 2001. Sections 103.10 - 103.24 are being repealed and rewritten in a clearer, more organized manner.

New §103.1 has been renamed and rewritten to include potential activities which the department may undertake. It also updates legacy agency references. New §103.2 updates legacy agency references, removes definitions that are no longer applicable, clarifies existing definitions, and adds definitions previously defined in rule language. New §103.3 has been renamed and rewritten to include language regarding confidentiality of records and release of data. It also updates legacy agency references and clarifies existing language. New §103.4 has been renamed and rewritten to encompass language in both repealed §103.12 and §103.13. It lists those that are required to report, reportable conditions, and responsibilities of a local or regional health authority. New §§103.5 - 103.8 have been renamed and renumbered to include timeframes, minimal reportable information on conditions, procedures for reporting, and the provisions for third party services. New §103.5 addresses these issues with reference to emergency medical service providers; new §103.6 with reference to physicians, medical examiners, and justices of the peace; new §103.7 with reference to hospitals; and new §103.8 with reference to acute and post-acute facilities.

FISCAL NOTE

Casey S. Blass, Director, Disease Prevention and Intervention Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Blass has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Blass has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The institutions and individuals responsible for reporting injuries and events will have clear guidance regarding what is reportable; the public health community will have clear guidance on its legal responsibilities regarding reporting of injuries and events; and the general public will be better served by the department as it fulfills its responsibility to monitor reportable injuries and events, assess and respond to the threat it presents to the public's health.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be directed to Linda M. Jones, MSPH, Manager, Environmental Epidemiology and Injury Surveillance Group, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3199, or by e-mail to linda.jones@dshs.state.tx.us (please include the words "Reportable Injuries and Events " in the subject line). Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

25 TAC §§103.1 - 103.24

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Health and Safety Code, §92.002(a), Injury Prevention and Control Act, which authorizes the department to require the reporting of spinal cord injuries, traumatic brain injuries, and submersion injuries; §92.002(b) which authorizes the department to require the reporting of other possible injuries; §92.002(c) which authorizes the department to maintain and revise a list of reportable injuries; §92.002(d) which authorizes the department to adopt rules as necessary to administer this subchapter; §92.003(a) which authorizes the department to name persons required to report injuries; §92.003(c) which authorizes the department to require any information deemed necessary for the administration of the subchapter; Health and Safety Code, §773.112, which authorizes the department to adopt rules establishing requirements for data collection, including trauma incidence reporting; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeals affect Health and Safety Code, Chapters 773 and 92.

§103.1. Purpose.
§103.2. Definitions.
§103.3. List of Reportable Injuries or Conditions.
§103.4. Reporting Requirements.
§103.5. General Control Measures for Reportable Injuries.
§103.6. Powers and Duties of the Department.
§103.7. Confidential Nature of Case Reporting.
§103.8. Investigations.
§103.9. Technical Advisory Committee on Injury Reporting.
§103.10. Purpose.
§103.11. Definitions.
§103.12. List of Reportable Injuries and Conditions.
§103.13. Who Shall Report.
§103.14. Reporting Requirements for Hospitals.
§103.15. Reporting Requirements for Physicians, Medical Examiners, and Justices of the Peace.
§103.16. Reporting Requirements for Pre-hospital Providers.
§103.17. Reporting Requirements for Rehabilitation Facilities.
§103.18. Reporting by Paper Form.
§103.19. Electronic Reporting.
§103.20. General Control Measures for Reportable Injuries.
§103.21. Powers and Duties of the Department.
§103.22. Confidential Nature of Case Reporting.
§103.23. Investigations.
§103.24. Technical Advisory Committee on Injury Reporting.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703801
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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25 TAC §§103.1 - 103.8

STATUTORY AUTHORITY

The proposed new sections are authorized by Health and Safety Code, §92.002(a), Injury Prevention and Control Act, which authorizes the department to require the reporting of spinal cord injuries, traumatic brain injuries, and submersion injuries; §92.002(b) which authorizes the department to require the reporting of other possible injuries; §92.002(c) which authorizes the department to maintain and revise a list of reportable injuries; §92.002(d) which authorizes the department to adopt rules as necessary to administer this subchapter; §92.003(a) which authorizes the department to name persons required to report injuries; §92.003(c) which authorizes the department to require any information deemed necessary for the administration of the subchapter; Health and Safety Code, §773.112, which authorizes the department to adopt rules establishing requirements for data collection, including trauma incidence reporting; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed new sections affect Health and Safety Code, Chapters 773 and 92.

§103.1. Purpose and Purview.

(a) These sections implement the following Health and Safety Codes.

(1) Chapter 92 authorizes the Texas Board of Health to adopt rules concerning the reporting and control of injuries.

(2) Chapter 773, §773.112(c) and §773.113(a)(3), requires the department to establish and maintain a trauma reporting and analysis system.

(3) The Texas Department of Health and the Texas Board of Health were abolished by Chapter 198, §1.18 and §1.26, 78th Legislature, Regular Session, 2003. Health and Safety Code, Chapter 1001, establishes the Department of State Health Services (department), which

now administers these programs. Government Code, §531.0055, provides authority to the Executive Commissioner of the Health and Human Services Commission to adopt rules for the department.

(b) The Commissioner or the Commissioner's designee shall, as circumstances may require, proceed as follows.

(1) May contact a medical examiner, justice of the peace, physician, hospital, or acute or post-acute rehabilitation facility attending a person with a case or suspected case of a required reportable event.

(2) May provide aggregate data with the suppression of values at the discretion of the Registry.

(3) May release data to other areas of the department.

(4) May give information concerning the injury or its prevention to the patient or a responsible member of the patient's household to prevent further injury.

(5) May collect, or cause to be collected, medical, demographic, or epidemiological information from any medical or laboratory record or file to help the department in the epidemiologic evaluation of injuries and their causes.

(6) Investigation may be made by staff of the department for verifying the diagnosis, ascertaining the cause of the injury, obtaining a history of circumstances surrounding the injury, and discovering unreported cases.

(A) May enter at reasonable times and inspect within reasonable limits, a public place or building, including a public conveyance, in the commissioner's duty to prevent injury.

(B) May not enter a private residence to conduct an investigation about the causes of injuries without first receiving permission from a lawful adult occupant of the residence.

§103.2. Definitions.

The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Business associate--A covered entity performing a function on behalf of an entity reporting under this chapter as defined in, 45 Code of Federal Regulation (CFR) §160.103.

(2) Call for assistance--An event where an EMS provider is activated via an internal communication system or by a 9-1-1 operator.

(3) Case--A person in whom an injury is identified by a physician or medical examiner based upon clinical evaluation, interpretation of laboratory and/or roentgenographic findings, and an appropriate exposure history.

(4) Commissioner--Commissioner of the Department of State Health Services.

(5) Department--The Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3180.

(6) Electronic reporting--Submitting data by computer in a format prescribed by the department.

(7) Emergency Medical Services (EMS) provider--A person who uses, operates or maintains EMS vehicles and EMS personnel to provide EMS; as defined by Health and Safety Code, §773.003(11) and Chapter 157, Subchapter A, §157.2 of this title (relating to Definitions).

(8) Health authority--A physician appointed as such under Texas Health and Safety Code, Chapter 121.

(9) Injury--Damage to the body resulting from intentional or unintentional acute exposure to thermal, mechanical, electrical, or chemical energy, or from the absence of essentials such as heat or oxygen.

(10) Investigation--Fieldwork designed to obtain more information about an incident.

(11) Local health department--A department created under the Texas Health and Safety Code, Chapter 121.

(12) Paper reporting--Submitting data on paper in a format prescribed by the department; if sent by mail or courier, reports shall be placed in a sealed envelope, marked "Confidential Medical Records" to the following address: Attention: EMS/Trauma Registry, Texas Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3180.

(13) Regional Registry--A system that collects, maintains, and reports EMS provider runs and trauma data to the department for a designated area of the state.

(14) Registry--The Texas EMS/Trauma Registry is the staff and the statewide databases housed within the department; responsible for the collection, maintenance, and evaluation of medical and system information related to required reportable events as defined in this section.

(15) Reporting entity--An EMS provider, a Justice of the Peace, a medical examiner, a physician, a hospital, or an acute or post-acute rehabilitation facility.

(16) Reportable event--Any injury or incident required to be reported under this chapter.

(17) Run--A resulting action from a call for assistance where an EMS provider:

(A) is dispatched to;

(B) responds to;

(C) provides care to; or

(D) transports a person.

(18) Spinal cord injury (SCI)--An acute, traumatic lesion of the neural elements in the spinal canal, resulting in any degree of sensory deficit, motor deficits, or bladder/bowel dysfunction. The following International Classification of Diseases 9th Revision Clinical Modification (ICD-9-CM) diagnostic codes are to be used to identify cases of traumatic spinal cord injury: 806.0-806.9 and 952.0-952.9.

(19) Submersion injury--The process of experiencing respiratory impairment from submersion/immersion in liquid.

(20) Suspected case--A case in which an injury is assumed, but a diagnosis is not yet made, as in the example of justices of the peace.

(21) Third-party services--Includes, but is not limited to a regional registry located in a trauma service area (TSA), a billing agency, or a data reporting agency.

(22) Trauma--An injury or wound to a living body caused by the application of an external force, including but not limited to violence, burns, poisonings, submersion incidents, traumatic brain injuries, traumatic spinal cord injuries, and suffocations.

(23) Trauma service area (TSA)--A multi-county area in which an emergency medical services and trauma care system has been developed by a Regional Advisory Council and has been recognized by the department.

(24) Traumatic brain injury (TBI)--An acquired injury to the brain, including brain injuries caused by anoxia due to submersion

incidents. The following International Classification of Diseases 9th Revision Clinical Modification (ICD-9-CM) diagnostic codes are to be used to identify cases of traumatic brain injury: 800.0-801.9, 803.0-804.9, and 850.0-854.1. The ICD-9-CM diagnostic code to be used to identify traumatic brain injury caused by anoxia due to submersion incidents is 348.1 or 994.1.

(25) Traumatic injury--An injury listed in the International Classification of Diseases 9th Revision Clinical Modification (ICD-9-CM) diagnostic codes between 800.0 and 959.9, excluding 905-909, 910-924, and 930-939, and admitted to a hospital inpatient setting (for more than 48 hours), or died after receiving any evaluation or treatment or was dead on arrival, or transferred into or out of the hospital.

§103.3. Confidentiality.

(a) All information and records relating to injuries received by the local health authority or the department, including information electronically submitted to the Registry and information from injury investigations, are sensitive, confidential, and not public records.

(b) These records shall be held in a secure place and accessed only by authorized personnel. All communications pertaining to these records shall be clearly labeled "Confidential" and will follow established departmental internal protocols and procedures.

(c) Information or records relating to any personal injury may not be released or made public on subpoena or otherwise, except that release may be made:

(1) for statistical purposes, if released in a manner that prevents the identification of any person;

(2) with the consent of each person identified in the information released; or

(3) to medical personnel in a medical emergency to the extent necessary to protect the health or life of the named person.

(d) The department may limit the release of record-level data for medical research to those studies with high scientific merit and have been approved by the department's Institutional Review Board.

(e) A reporting entity may request in writing its own reportable data that has been submitted to the Registry.

§103.4. Who Shall Report and List of Reportable Injuries and Events.

(a) EMS Provider--All runs.

(b) Justice of the Peace--

(1) Submersion injuries.

(2) Traumatic brain injuries.

(3) Spinal cord injuries.

(c) Medical Examiner--

(1) Submersion injuries.

(2) Traumatic brain injuries.

(3) Spinal cord injuries.

(d) Physician--

(1) Submersion injuries.

(2) Traumatic brain injuries.

(3) Spinal cord injuries.

(4) However, a physician shall be exempt from reporting, if a hospital or acute or post-acute rehabilitation facility admitted the patient and fulfilled the reporting requirements as stated in §103.7 of this title (relating to Reporting Requirements for Hospitals) or §103.8 of this title (relating to Reporting Requirements for Acute or Post-Acute Rehabilitation Facilities).

(e) Hospital--

(1) Submersion injuries.

(2) Traumatic brain injuries.

(3) Spinal cord injuries.

(4) Other Traumatic injuries.

(f) Acute or post-acute rehabilitation facility--

(1) Traumatic brain injuries.

(2) Spinal cord injuries.

(g) The professionals or organizations listed in this section must send all reports of injuries and events listed in this section to the Registry. If the above listed professionals or organizations choose to notify a local or regional health authority to respond on their behalf, the local or regional health authority must report to the Registry within ten workdays.

§103.5. Reporting Requirements for EMS Providers.

(a) General Information.

(1) All data should be transmitted at least quarterly; monthly electronic data submissions are recommended.

(2) EMS providers shall submit data to the Registry within three months of the date of call for assistance.

(3) EMS providers must complete and submit a No Reportable Data (NRD) Form to the Registry within ninety days of any given month with no runs.

(b) Data Elements and Methods.

(1) All runs, as defined in the Texas EMS/Trauma Registry EMS Data Dictionary, must be submitted electronically to the department's online EMS/Trauma Registry System.

(2) NRD Form--If an EMS provider does not have any monthly electronic records to transmit because the EMS provider did not receive any calls for assistance, the EMS provider must submit to the Registry, within ninety days, a completed electronic form, prescribed by the department, stating that it did not have any runs to report for that month.

(c) Third-party Services.

(1) An EMS provider may use the services of a business associate to transmit an electronic data file to the department.

(2) Any third-party service used by an entity reporting under this rule may be a business associate upon conclusion of a business associate agreement between the EMS provider and the third-party service.

§103.6. Reporting Requirements for Physicians, Medical Examiners, and Justices of the Peace.

(a) General Information.

(1) All data should be transmitted at least quarterly; monthly electronic data submissions are recommended.

(2) Physicians, Medical Examiners, and Justices of the Peace shall submit data to the Registry within three months of the identification of a required reportable event.

(b) Data Elements and Methods. If a specialized reporting system exists for a required reportable event, then the case or suspected

case must be submitted to all relevant reporting systems as defined in its respective data dictionary.

§103.7. Reporting Requirements for Hospitals.

(a) General Information.

(1) All data should be transmitted at least quarterly; monthly electronic data submissions are recommended.

(2) Hospitals shall submit data to the Registry within three months of a patient's discharge from their facility.

(3) Hospitals must complete and submit a No Reportable Data (NRD) Form to the Registry within ninety days of any given month that the hospital did not treat or document a required reportable event.

(b) Data Elements and Methods.

(1) All required reportable events, as defined in the department's EMS/Trauma Registry Hospital Data Dictionary, must be submitted electronically to the online EMS/Trauma Registry System.

(2) If a specialized reporting system exists for a required reportable event, then the case or suspected case must be submitted to all relevant reporting systems as defined in its respective data dictionary.

(3) NRD Form--If a hospital does not have any monthly electronic records to transmit or paper forms to send because the hospital did not treat or document a submersion injury, a TBI, an SCI, or any other traumatic injury, the hospital must complete and submit to the Registry within ninety days, an electronic or paper form prescribed by the department, stating that it did not have any required reportable events to report for that month.

(c) Third-party Services.

(1) A hospital may use the services of a business associate to transmit an electronic data file to the department.

(2) Any third-party service used by an entity reporting under this rule may be a business associate upon conclusion of a business associate agreement between the hospital and the third-party service.

§103.8. Reporting Requirements for Acute or Post-Acute Rehabilitation Facilities.

(a) General Information.

(1) All data should be transmitted at least quarterly; monthly electronic data submissions are recommended.

(2) A facility shall submit data to the Registry within three months of a patient's discharge from their facility.

(b) Data Elements and Methods.

(1) The following data elements must be submitted to the Registry for all required reportable events:

(A) patient's name, race/ethnicity, sex, and date of birth;

(B) date of injury and cause of injury;

(C) date of admission, date of discharge, and discharge destination;

(D) functional independence measure score at admission, functional independence measure score at discharge, and diagnoses; and

(E) type of services provided, payor, and billed charges.

(2) If a specialized reporting system exists for a required reportable event, then the case or suspected case must be submitted to all relevant reporting systems as defined in its respective data dictionary.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703802
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 123. RESPIRATORY CARE PRACTITIONER CERTIFICATION

25 TAC §§123.1 - 123.16

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§123.1 - 123.16, concerning the regulation and certification of respiratory care practitioners.

BACKGROUND AND PURPOSE

The proposed repeals are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC Chapter 140, Health Professions Regulation. The new rules transfer and update existing language, and do not impose any new requirements or fees on applicants or licensees. One change affects continuing education. In response to stakeholder input, licensees will be able to take more continuing education hours through self-directed study (including Internet based courses). The current rules allow up to six hours each renewal period; the new rules will permit up to 12 of the required 24 hours to be taken as self-directed study.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 123.1 - 123.16 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the department is proposing to repeal the existing sections and adopt the rules in 25 TAC Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

The repeal of §§123.1 - 123.16 is necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC Chapter 140, Health Professions Regulation.

FISCAL NOTE

Debbie Peterson, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five-year period that the repeal is in effect, there will be no fiscal implica-

tions to state or local government as a result of enforcing or administering the repeal as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Peterson has also determined that there will be no effect on small businesses or micro-businesses required to comply with the repeal as proposed. This determination was made because the repeal does not impose any new requirements. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Peterson has also determined that for each year of the first five years the repeal is in effect, the public will benefit from the adoption of the repeal and new sections. The public benefit anticipated as a result of enforcing or administering the repeal and new sections is to continue to ensure public health and safety through the certification and regulation of respiratory care practitioners.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the pubic health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Pam K. Kaderka, Program Director, Respiratory Care Practitioners Certification Program, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6634 or by e-mail to Pam.Kaderka@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed repeal has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed repeal is authorized by Occupations Code, §604.052, which authorizes the adoption of rules for the regulation of respiratory care practitioners; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of these rules implements Government Code, §2001.039.

The proposed repeal affects the Occupations Code, Chapter 604; Government Code, Chapter 531; and Health and Safety Code, Chapter 1001.

§123.1. Context.

§123.2. Definitions.

§123.3. Respiratory Care Practitioners Advisory Committee.

§123.4. Fees.

§123.5. Exemptions.

§123.6. Application Requirements and Procedures.

§123.7. Types of Certificates and Temporary Permits and Applicant Eligibility.

§123.8. Examination.

§123.9. Certificate Renewal.

§123.10. Continuing Education Requirements.

§123.11. Changes of Name or Address.

§123.12. Professional and Ethical Standards.

§123.13. Certifying or Permitting Persons with Criminal Backgrounds To Be Respiratory Care Practitioners.

§123.14. Violations, Complaints, and Subsequent Actions.

§123.15. Informal Disposition.

§123.16. Suspension of License Relating to Child Support and Child Custody.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 22, 2007.

TRD-200703825
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

CHAPTER 128. PERMITS FOR CONTACT LENS DISPENSERS

25 TAC §§128.1 - 128.15

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§128.1 - 128.15, concerning permits for contact lens dispensers.

BACKGROUND AND PURPOSE

The proposed repeals are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 Texas Administrative Code (TAC), Chapter 140, Health Professions Regulation. The new rules transfer and update existing language, and do not impose any new requirements or fees on applicants or permit holders.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 128.1 - 128.15 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the department is proposing to repeal the existing sections and adopt the rules in 25 TAC, Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

The repeal of §§128.1 - 128.15 consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC, Chapter 140, Health Professions Regulation.

FISCAL NOTE

Debbie Peterson, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five-year period that the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Peterson has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This determination was made because the repeals do not impose any new requirements. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Peterson has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the permitting and regulation of contact lens dispensers.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the pubic health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Yvonne Feinleib, Program Director, Contact Lens Dispensing Permit Program, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-4521 or by email to Yvonne.Feinleib@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed repeals are authorized by Occupations Code, §353.005, which authorizes the adoption of rules regarding contact lens dispensing permits; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of these rules implements Government Code, §2001.039.

The proposed repeals affect the Occupations Code, Chapter 353; Government Code, Chapter 531; and Health and Safety Code, Chapter 1001.

§128.1. Introduction.

§128.2. Definitions.

§128.3. Fees.

§128.4. Petition for Rulemaking.

§128.5. Sale or Delivery of Contact Lenses and Prescription Verification.

§128.6. Display of Permit.

§128.7. Application Requirements and Procedures.

§128.8. Application Processing.

§128.9. Renewal of Permit.

§128.10. Changes of Name or Address.

§128.11. Filing Complaints and Complaint Investigations.

§128.12. Grounds for Disciplinary Actions.

§128.13. Informal Disposition.

§128.14. Formal Hearings.

§128.15. Guidelines For Issuing Permits to Persons with Criminal Convictions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703827

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: October 7, 2007

For further information, please call: (512) 458-7111 x6972

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CHAPTER 137. BIRTHING CENTERS

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes the repeal of §§137.1 - 137.4, 137.11 - 137.13, 137.21 - 137.26, 137.31 - 137.34, 137.36 - 137.44, 137.46 - 137.55 and new §§137.1 - 137.4, 137.11 - 137.13, 137.21 - 137.26, 137.31 - 137.34, 137.36 - 137.44, and 137.46 - 137.55, concerning the regulation of birthing centers.

BACKGROUND AND PURPOSE

The repeals and new sections are necessary to comply with Government Code, Chapter 2054, Subchapter K, which requires the department to participate in an electronic system for occupational licensing transactions (TexasOnline); Acts, 2003, 78th Legislative, Regular Session, Chapter 198, (House Bill (HB) 2292), §2.42, added Health and Safety Code, §12.0111, which requires the department to charge a fee sufficient to cover the cost of administering and enforcing the licensing program; and Health and Safety Code, §12.0112, which requires that the term for licenses issued or renewed after January 1, 2005 will be two years.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 137.1 - 137.4, 137.11 - 137.13, 137.21 - 137.26, 137.31 - 137.34, 137.36 - 137.44, and 137.46 - 137.55 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Proposed new §§137.1 - 137.4, 137.11 - 137.13, 137.21 - 137.26, and 137.31- 137.34, 137.36 - 137.44, and 137.46 - 137.55 provide clarification to the rules, update references to statutes and rules, and change the name of the department and its programs. The new §137.2 adds definitions and deletes definitions not used in the rules. The new §§137.3 - 137.4 and 137.11 add language regarding the implementation of the two-year renewal cycle for licenses as mandated under HB 2292, the payment of fees for a two-year license, and the department's authority to collect fees related to application processing through the TexasOnline Authority. The new §137.13 clarifies timelines for submitting applications and/or corrections to applications and clarifies language regarding and applicants right to request a refund of an application fee. The new §137.22 requires a hearing to be requested within 25 days instead of 20 calendar days. New §137.33 clarifies personnel policy requirements. New §137.34 adds language to show additional documents to be included in the personnel record for each employee. The new §137.39 clarifies that the birthing center is responsible for all care provided on its licensed premises.

FISCAL NOTE

Renee Clack, Section Director, Health Care Quality Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Clack has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Clack has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to ensure patient health and safety when birthing center care is necessary.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Julie Long, Facility Licensing Group, Regulatory Licensing Unit, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6646 or by email to julie.long@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed

by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §§137.1 - 137.4

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Health and Safety Code, Chapters 12, 244 and 1001; and Government Code, Chapter 531.

§137.1. Purpose and Scope.

§137.2. Definitions.

§137.3. Licensing Fees.

§137.4. General Provisions for Licensure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703856
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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25 TAC §§137.1 - 137.4

STATUTORY AUTHORITY

The proposed new sections are authorized by Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The proposed new sections affect the Health and Safety Code, Chapters 12, 244 and 1001; and Government Code, Chapter 531.

§137.1. Purpose and Scope.

(a) The purpose of this chapter is to implement the Texas Birthing Center Licensing Act, Health and Safety Code, Chapter 244, which requires birthing centers (centers) to be licensed by the Department of State Health Services (department) and requires the department to adopt rules governing the licensing and regulation of centers.

(b) This chapter establishes general provisions, licensing procedures, enforcement, and operational and clinical standards for the provision and coordination of treatment and services.

(c) This chapter applies to all centers as defined in §137.2 of this title (relating to Definitions). Such centers must be licensed in accordance with the provisions of this chapter. A person may not engage in the business of providing center services, or represent to the public that the person is a provider of such services for pay or other consideration without a license.

§137.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--Texas Birthing Center Licensing Act, Health and Safety Code, Chapter 244, relating to the licensure and regulation of centers.

(2) Acute postpartum period--A minimum of two hours following the delivery of the placenta and until the client is clinically stable.

(3) Administrator--A person who is delegated the responsibility for the implementation and proper application of policies, programs, and services established for the center.

(4) Admission--A client that is accepted by the center after a risk assessment is performed.

(5) Affiliate--With respect to an applicant or owner which is:

(A) a corporation--includes each officer, director, stockholder with a direct ownership of at least 5.0%, subsidiary, and parent company;

(B) a limited liability company--includes each officer, member, and parent company;

(C) an individual--includes:

(i) the individual's spouse;

(ii) each partnership and each partner thereof of which the individual or any affiliate of the individual is a partner; and

(iii) each corporation in which the individual is an officer, director, or stockholder with a direct ownership of at least 5.0%;

(D) a partnership--includes each partner and any parent company; and

(E) a group of co-owners under any other business arrangement--includes each officer, director, or the equivalent under the specific business arrangement and each parent company.

(6) Applicant--The owner of a center which is applying for a license under the Act. This is the person in whose name the license will be issued.

(7) Birth attendant--A physician, certified nurse-midwife (CNM), or a licensed midwife.

(8) Center--A facility, place, or institution where a woman is scheduled to give birth. This term does not include a hospital, ambu-

latory surgical center, a nursing home, or the residence of the woman giving birth.

(9) Certified nurse-midwife (CNM)--A person who is:

(A) a registered nurse who is currently licensed under the Nursing Practice Act, Texas Occupations Code, Chapters 301, 303 and 304;

(B) recognized as an advanced practice nurse by the Board of Nurse Examiners for the State of Texas; and

(C) certified by the American College of Nurse-Midwives (ACNM) or ACNM Accreditation Council.

(10) Client--A woman who is scheduled to give birth at a center and the newborn of that birth.

(11) Clinical care--Direct provision of care to center clients.

(12) Clinical care provider--A registered nurse (RN), licensed vocational nurse (LVN), physician assistant (PA), or adult unlicensed staff person who is capable of recognizing complications and who can care for the mother and newborn by performing the minimum duties set out in §137.48(d) of this title (relating to Labor and Birth Procedures).

(13) Clinical director--A person who is responsible for advising and consulting with the staff of a center on all matters relating to the clinical management of all clients.

(14) Critical item--All surgical instruments and objects that are introduced directly into the bloodstream or into other normally sterile areas of the body.

(15) Decontamination--The physical and chemical process that renders an inanimate object safe for further handling.

(16) Department--The Department of State Health Services.

(17) Disinfection--The destruction or removal of vegetative bacteria, fungi, and most viruses but not necessarily spores; the process does not remove all organisms but reduces them to a level that is not harmful to health. There are three levels of disinfection:

(A) high level disinfection--kills all organisms, except high levels of bacterial spores, and is effected with a chemical germicide cleared for marketing as a sterilant by the Food and Drug Administration;

(B) intermediate-level disinfection--kills mycobacteria, most viruses, and bacteria with a chemical germicide registered as a "tuberculocide" by the Environmental Protection Agency (EPA); and

(C) low-level disinfection--kills some virus and bacteria with a chemical germicide registered as a hospital disinfectant by the EPA.

(18) Health care facility--Any type of facility or home and community support services agency licensed (or equivalent) to provide health care in any state or certified for Medicare (Title XVIII) and Medicaid (Title XIX) participation in any state.

(19) Hospital--A facility that is licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241 or, if exempt from licensure, certified by the United States Department of Health and Human Services as in compliance with conditions of participation for hospitals in Title XVIII, Social Security Act (42 United States Code, §§1395 et seq.).

(20) Initial license--The first license that is issued to an applicant indicating that the center meets all requirements of this chapter for a license.

(21) Licensed health care professional--An individual licensed in the state of Texas to provide specific health care services within a defined scope of practice by their licensing rules or Act.

(22) Licensed midwife--A person who practices midwifery and is licensed under the Texas Midwifery Act, Texas Occupations Code, Chapter 203.

(23) Licensed premises--The location stated or described in the application that is licensed by the department.

(24) Licensed vocational nurse (LVN)--A person who is currently licensed under the Nurse Practice Act, Texas Occupations Code, Chapters 301, 303, and 304, as a licensed vocational nurse.

(25) Low-risk pregnancy--A pregnancy that is determined by history, application of a risk assessment, and prenatal care that broadly predicts an outcome of a normal, uncomplicated pregnancy.

(26) Manager--The manager of the Facility Licensing Group of the Department of State Health Services or his or her designee.

(27) Midwife--A certified nurse-midwife (CNM) or a licensed midwife.

(28) Noncritical items--Items that come in contact with intact skin.

(29) Notarized copy--A sworn affidavit stating that attached copies are true and correct copies of the original documents.

(30) Person--An individual, firm, partnership, corporation, or association.

(31) Physician--A person who is currently licensed under the Medical Practice Act, Texas Occupations Code, Chapters 151 - 165, to practice medicine.

(32) Physician assistant (PA)--A person who is currently licensed under the Physician Assistant Licensing Act, Texas Occupations Code, Chapter 204, as a physician assistant.

(33) Physician consultant--A physician who is currently licensed under the Medical Practice Act, Texas Occupations Code, Chapters 151 - 165, to practice medicine and who consults with a center.

(34) Plan of correction--A written strategy for correcting a licensing violation. The plan of correction shall be developed by the facility and shall address the systems operations of the facility as the systems operations apply to the deficiency.

(35) Policy--A written document which describes all procedures to be followed at the facility including medical and personnel issues which is to be maintained at the licensed premises for a minimum of five years.

(36) Presurvey conference--A conference held with department staff and the applicant or his or her representatives to review licensure standards, survey documents, and provide consultation prior to the on-site licensure survey.

(37) Quality assurance--An ongoing, objective, and systematic process of monitoring, evaluating, and improving the quality, appropriateness, and effectiveness of care.

(38) Quality improvement--An organized, structured process that selectively identifies improvement projects to achieve improvements in products or services.

(39) Referral hospital--A hospital that a center has identified as capable of providing care and services to mothers or infants who require the services of a physician.

(40) Registered nurse (RN)--A person who is currently licensed under the Nurse Practice Act, Texas Occupations Code, Chapters 301, 303, and 304 as a registered nurse.

(41) Risk-assessment--A process by which application of historical, physical, and laboratory data is used for the prediction of pregnancy outcome.

(42) Semi-critical items--Items that come in contact with nonintact skin or mucous membranes. Semi-critical items may include respiratory therapy equipment and thermometers.

(43) Standards--Minimum requirements under the Act and this chapter.

(44) Sterile field--The operative area of the body and anything that directly contacts this area.

(45) Sterilization--The use of a physical or chemical procedure to destroy all microbial life, including bacterial endospores.

(46) Survey--A survey or investigation conducted by a representative of the department to determine if a licensee is in compliance with the statute and this chapter. A survey may be conducted onsite, by mail, by telephone, or by electronic communication methods.

§137.3. Licensing Fees.

(a) The schedule of fees for a license is as follows:

(1) initial license fee is $2,000;

(2) renewal license fee is $2,000; and

(3) change of ownership license fee is $2,000.

(b) The department will not consider an application as officially submitted until the applicant pays the licensing fee. The fee must accompany the application form.

(c) A license fee paid to the department is not refundable.

(d) Any remittance submitted to the department in payment of a required license fee must be in the form of a personal check, certified check, or money order made payable to the Department of State Health Services.

(e) For all renewal licenses, the department is authorized to collect subscription and convenience fees, in amounts determined by the TexasOnline Authority, to recover costs associated with renewal processing through TexasOnline, in accordance with Texas Government Code, §2054.111.

(f) The department may make periodic reviews of its license fee schedule to ensure that the fees imposed are in amounts reasonable and necessary to defray the cost to the department of administering the Act.

§137.4. General Provisions for Licensure.

(a) All first-time applications for a license are applications for an initial license.

(b) The applicant must be at least 18 years of age.

(c) A separate license is required for each place of business.

(d) A center may not admit a client in labor until it has received an initial license.

(e) The licensed location must be in Texas.

(f) The owner of the center is responsible for ensuring the center's compliance with the Act and this chapter.

(g) A license must be renewed biannually.

(h) The license shall be displayed in a public area of the center that is readily accessible to patients, employees and visitors.

(i) The license may not be transferred or assigned from one person to another person.

(j) A center shall have the financial ability to carry out its functions under the Act and this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703857
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER B. LICENSING PROCEDURES

25 TAC §§137.11 - 137.13

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Health and Safety Code, Chapters 12, 244 and 1001; and Government Code, Chapter 531.

§137.11. Application Procedures and Issuance of Licenses.

§137.12. Change of Ownership or Services and Closure.

§137.13. Time Periods for Processing and Issuing a License.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703858

Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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25 TAC §§137.11 - 137.13

STATUTORY AUTHORITY

The proposed new sections are authorized by Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The proposed new sections affect the Health and Safety Code, Chapters 12, 244 and 1001; and Government Code, Chapter 531.

§137.11. Application Procedures and Issuance of Licenses.

(a) The application.

(1) An applicant shall not misstate a material fact on any documents required to be submitted under this subsection.

(2) The application form must be accurate and complete and must contain original signatures. The nonrefundable license fee must be submitted with the application.

(3) The following information must be submitted on the original application form and the application shall be notarized:

(A) information on the applicant including name, street address, mailing address, social security number or federal tax identification number, and if applicable, date of birth and driver's license number;

(B) the name, mailing address, and street address of the center. The street address provided on the application must be the address from which the center will be operating and providing services;

(C) a list of names and business addresses of all persons who own any percentage interest in the applicant including:

(i) each limited partner and general partner if the applicant is a partnership; and

(ii) each shareholder, member, director, and officer if the applicant is a corporation, limited liability company or other business entity;

(D) a list of any businesses with which the applicant subcontracts and in which the persons listed under subparagraph (C) of this paragraph hold any percentage of the ownership;

(E) if the applicant has held or holds a center license or has been or is an affiliate of another licensed center, the relationship, including the name and current or last address of the other center and the date such relationship commenced and, if applicable, the date it was terminated;

(F) if the center is operated by or proposed to be operated under a management contract, the names and addresses of any person and organization having an ownership interest of any percentage in the management company;

(G) a written plan for the orderly transfer of care of the applicant's clients and clinical records if the applicant is unable to maintain services under the license;

(H) the organizational structure of the staffing for the center;

(I) the names and addresses of the physicians, certified nurse-midwives, licensed midwives and other clinical care providers who will provide services at the center;

(J) the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) any orders of denial, suspension, or revocation of a center license, a license for any health care facility in any state, or documentation as a midwife; or any other enforcement action, such as (but not limited to) court civil or criminal action;

(ii) any orders of denial, suspension, or revocation of or other enforcement action against a center license, a license for any health care facility in any state, or documentation as a midwife which is or was proposed by the licensing agency and the status of the proposal;

(iii) surrendering a license before expiration of the license or allowing a license to expire in lieu of the department proceeding with enforcement action;

(iv) federal or state (any state) criminal felony arrests or convictions;

(v) federal or state Medicaid or Medicare sanctions or penalties relating to the operation of a health care facility;

(vi) operation of a health care facility that has been decertified in any state under Medicare or Medicaid; or

(vii) debarment, exclusion, or contract cancellation in any state from Medicare or Medicaid;

(K) for the two-year period preceding the application date, the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) federal or state (any state) criminal misdemeanor arrests or convictions convictions;

(ii) federal or state (any state) tax liens;

(iii) unsatisfied final judgement(s);

(iv) eviction involving any property or space used as a center or health care facility in any state;

(v) injunctive orders from any court; or

(vi) unresolved final state or federal Medicare or Medicaid audit exceptions; and

(L) the telephone number, and fax number (if available) of the center and the telephone number where the administrator can usually be reached when the center is closed.

(b) Applicant copy. The applicant shall retain a copy of all documentation that is submitted to the department.

(c) Application processing. Upon the department's receipt of the application form, the required information described in subsection (a)(3) of this section, and the initial license fee from an applicant, the

department shall review the material to determine whether it is complete and correct.

(1) The time periods for reviewing the material shall be in accordance with §137.13 of this title (relating to Time Periods for Processing and Issuing a License).

(2) If a center receives a notice from the department that some or all of the information required under subsection (a)(3) of this section is deficient, the center shall submit the required information no later than 60 calendar days from the date of the notice.

(A) A center which fails to submit the required information within 60 calendar days from the notice date is considered to have withdrawn its application for an initial license. The license fee will not be refunded.

(B) A center which has withdrawn its application must reapply for a license in accordance with this section, if it wishes to continue the application process. A new license fee is required.

(d) Withdrawal of application process. If an applicant decides at any time not to continue the application process for an initial license, the application will be withdrawn upon written request from the applicant. The license fee will not be refunded.

(e) Issuance of an initial license and renewal procedures.

(1) Presurvey conference. Once the department has determined that the application form, the information required to accompany the application form, and the license fee are complete and correct, a representative from the department shall schedule a presurvey conference with the applicant in order to inform the applicant of the standards for the operation of the center. The presurvey conference may be waived by the department.

(2) Survey recommendation.

(A) The survey office shall verify compliance with the applicable provisions of the Act and this chapter and recommend that the center be issued an initial license or that the application be denied pursuant to §137.22 of this title (relating to License Denial, Suspension, Probation, or Revocation).

(B) Upon recommendation by the survey office:

(i) the department shall issue an initial license to an applicant that has been found to be in compliance with the provisions of the Act and this chapter; or

(ii) the department shall deny the application if the center has been found to be out of compliance with the provisions of the Act and this chapter. The procedure for denial of a license shall be in accordance with §137.22 of this title.

(3) Effective period of initial license. The initial license is valid for 24 months. The initial license expires on the last day of the month ending the licensure period.

(4) General requirements during the initial license period.

(A) A center shall comply with the provisions of the Act and this chapter during the initial license period.

(B) If an applicant decides not to continue the application process, the application will be withdrawn upon written request. If an initial license has been issued, the applicant shall cease providing services and return the original license certificate to the department with its written request to withdraw. The department shall acknowledge receipt of the request to withdraw. The license fee will not be refunded.

(f) Procedures for renewing a license.

(1) The department will send notice of expiration to a licensee at least 60 calendar days before the expiration date of a license. If the licensee has not received notice of expiration from the department 45 calendar days prior to the expiration date, it is the duty of the licensee to notify the department and request a renewal form.

(2) The licensee shall submit the renewal form to the department postmarked no later than 30 calendar days prior to the expiration date of the license:

(A) a complete and correct renewal form which includes updated disclosure information and ownership and management information as required by subsection (a)(3) of this section; and

(B) the renewal license fee.

(3) The time periods for processing an application shall be in accordance with §137.13 of this title.

(4) If timely and sufficient application is made for renewal, the license will not expire until the department issues the license or until the department denies renewal of the license.

(5) The department shall issue a renewal license to a licensee who meets the minimum standards for a license in accordance with the provisions of the Act and this chapter.

(6) Renewal licenses will be valid for 24 months.

(g) Failure to timely renew.

(1) General.

(A) If a licensee fails to submit a timely and sufficient renewal form and fee in accordance with subsection (f) of this section, the department shall notify the licensee that the center must cease operation on the expiration date of the license.

(B) No services shall be provided at the center after the expiration of the license.

(2) Active military duty exception. If a licensee fails to timely renew his or her license because the licensee is or was on active duty with the armed forces of the United States of America serving outside the State of Texas, the licensee may renew the license pursuant to this paragraph.

(A) Renewal of the license may be requested by the licensee, the licensee's spouse, or an individual having power of attorney from the licensee. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(B) Renewal may be requested before or after the expiration of the license.

(C) A copy of the official orders or other official military documentation showing that the licensee is or was on active military duty serving outside the State of Texas shall be filed with the department along with the renewal form.

(D) A copy of the power of attorney from the licensee shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this section.

(E) A licensee renewing under this paragraph shall pay the applicable renewal fee.

(F) A licensee is not authorized to operate the center for which the license was obtained after the expiration of the license unless and until the licensee actually renews the license.

(G) This paragraph applies to a licensee who is a sole practitioner or a partnership with only individuals as partners where all

of the partners were on active duty with the armed forces of the United States serving outside the State of Texas.

(h) General requirements for renewal of license.

(1) After the issuance of the initial license, a licensee is eligible for subsequent renewal of the license biannually if the licensee continues to comply with the provisions of the Act and this chapter and has applied for renewal of the license in accordance with subsection (f) of this section.

(2) If a licensee makes a timely and sufficient application for renewal of a license, and an action to revoke, suspend, or deny renewal of the license is pending, the license does not expire but does extend until the application for renewal is granted or denied after the opportunity for a formal hearing. A renewal license will not be issued unless the department has determined the reason for the proposed action no longer exists.

(3) Continuing compliance by the center with the provisions of the Act and this chapter is required during the previous 24-month license period in order for the license to be renewed.

(4) The licensee shall not misstate or omit a material fact on any documents required to be submitted to the department or required to be maintained by the center in accordance with the provisions of the Act and this chapter.

(5) During the license period, the center shall provide services to one or more clients and document the provision of services. The center must show proof that services have been provided under the license within the previous 24 months. Such documentation shall be available for review by a department surveyor.

(6) If a licensee decides not to continue the application process for the renewal of a license, the application may be withdrawn upon written request. The applicant shall cease providing services and return the original license certificate to the department with its written request to withdraw. The department shall acknowledge receipt of the request to withdraw. The license fee will not be refunded.

(i) On-site surveys. On-site surveys of the center shall be performed at a frequency prescribed by and in accordance with §137.21 of this title (relating to On-Site Surveys).

§137.12. Change of Ownership or Services and Closure.

(a) The following provisions apply to a change of ownership of a center and affect the condition of a license.

(1) A license is not transferable or assignable from one person to another person.

(2) A license issued by the department may not be materially altered in any way.

(3) A change of ownership of a center is effective when the name of the licensed person reflected on the license certificate and original application is changed by the department to reflect the name of the person applying for the change of ownership.

(4) A person who desires to receive a license in its name for a center licensed under the name of another person or to change the ownership of any center shall submit a new license application and the initial license fee at least 60 calendar days prior to the desired date of the change of ownership. The application shall be in accordance with §137.11(a) of this title (relating to Application Procedures and Issuance of Licenses).

(5) An application for a change of ownership shall include a notarized affidavit signed by the previous owner acknowledging agreement with the change of ownership. If the applicant is a corporation, the application shall include a copy of the applicant's articles of incorporation. If the applicant is a business entity other than a corporation, the applicant shall include a copy of the sales agreement.

(6) The previous owner's license shall be void on the effective date of the change of ownership.

(7) This subsection does not apply if a licensee is simply revising its name as allowed by law (i.e., a corporation is amending the articles of incorporation to revise its name).

(8) The sale of stock of a corporate licensee does not cause this subsection to apply.

(b) The following business changes affect the condition of a license and shall be reported to the department.

(1) If a center changes its business name, business address, telephone number of the center, administrator's telephone number, or fax number, the administrator must notify the department in writing within 15 calendar days after the effective date of the change.

(2) If a center changes its administrator, the center shall provide the name of the new administrator and effective date to the department in writing no later than 30 calendar days following such change.

(c) The licensee shall notify the department in writing within 15 calendar days when a center ceases operation. The licensee shall return the original license certificate to the department with the written notification.

§137.13. Time Periods for Processing and Issuing a License.

(a) Definition. For purposes of this section, license means a license, permit, registration, or certificate issued by the Department of State Health Services (department) for a birthing center.

(b) General. Time periods for processing and issuing a license.

(1) The date a license application is received is the date the application reaches the Facility Licensing Group of the Department of State Health Services (department).

(2) An application for an initial license is complete when the department has received, reviewed, and found acceptable the information described in §137.11(a)(3) of this title (relating to Application Procedures and Issuance of Licenses).

(3) An application for a renewal license is complete when the department has received, reviewed, and found acceptable the information described in §137.11(f)(2) of this title.

(4) An application for a change of ownership license is complete when the department has received, reviewed, and found acceptable the information described in §137.12 of this title (relating to Change of Ownership or Services and Closure).

(c) Time periods. An application from a center for an initial license, renewal license, or change of ownership license shall be processed in accordance with the following time periods.

(1) The first time period begins on the date the department receives the application and ends on the date the license is issued, or if the application is received incomplete, the period ends on the date the center is issued a written notice that the application is incomplete. The written notice shall describe the specific information that is required before the application is considered complete. The first time period is 45 calendar days.

(2) The second time period is 45 calendar days, which begins on the date the last item (information or fee) necessary to complete the application is received by the department and ends on the date the

license is issued, or the facility is issued a written notice that the application is being proposed for denial.

(3) If the applicant fails to submit the requested information and/or fee within 135 days of the date the department issued the written notice to the applicant as described in paragraph (1) of this subsection, that the application is incomplete and/or additional fees are owed, the application is considered withdrawn. Fees paid are not refundable. There will be no refund of the fee except as provided by subsections (d) and (f) of this section. A new application and fee must be submitted to the department.

(d) Reimbursement of fees.

(1) In the event the application is not processed in the time periods stated in subsection (c) of this section, the applicant has the right to make a written request within 30 days of the end of the second period that the department reimburse in full the fee paid in that particular application process.

(2) If the department finds that good cause existed for exceeding the established periods, the request will be denied. The department will notify the applicant in writing of the denial of the reimbursement within 30 days of the department's receipt of the request for reimbursement.

(e) Good cause for exceeding the period established is considered to exist if:

(1) the number of applications for licenses to be processed exceeds by 15% or more the number processed in the same calendar quarter the preceding year;

(2) another public or private entity utilized in the application process caused the delay;

(3) conditions in violation of the rules exist which are noted in recent investigations or inspections;

(4) the application is being held pending completion of an investigation, inspection, or enforcement action;

(5) the application is incomplete in information, signature, and/or fee amount submitted; or

(6) other conditions existed giving good cause for exceeding the established periods.

(f) Appeal. If the request for reimbursement as authorized by subsection (d)(1) of this section is denied, the applicant may, within 30 days of being notified of the denial, appeal to the department for a resolution of the dispute. The applicant shall give written notice to the department requesting reimbursement of the fee paid because the application was not processed within the established time period. Within 30 days of receiving the appeal, the department shall submit a written report to the commissioner of the facts related to the processing of the application and describing the good cause for exceeding the established time periods. The commissioner then has 30 days to make the final decision and provide written notification of the decision to the applicant and the manager.

(g) Hearings shall be conducted under the provision of contested case hearings pursuant to the Fair Hearing Procedures found in §§1.51 - 1.55 of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703859

Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. ENFORCEMENT

25 TAC §§137.21 - 137.26

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Health and Safety Code, Chapters 12, 244 and 1001; and Government Code, Chapter 531.

§137.21. On-Site Surveys.

§137.22. License Denial, Suspension, Probation, or Revocation.

§137.23. Emergency Suspension.

§137.24. Administrative Penalties.

§137.25. Complaints.

§137.26. Appointment and Qualifications of a Monitor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703860
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. SURVEY PROCEDURES AND ENFORCEMENT

25 TAC §§137.21 - 137.26

STATUTORY AUTHORITY

The proposed new sections are authorized by Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term

of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The proposed new sections affect the Health and Safety Code, Chapters 12, 244 and 1001; and Government Code, Chapter 531.

§137.21. On-Site Surveys.

(a) Requirement for on-site surveys. A representative of the department may enter the premises of a license applicant or license holder at reasonable times to conduct a survey incidental to the issuance of a license, and at other times as it considers necessary to ensure compliance with the Act and the rules adopted under the Act.

(b) Initial on-site survey.

(1) The department shall conduct the on-site survey within 90 calendar days of the date of issuance of the initial license to determine if the center meets the requirements of the Act and this chapter.

(2) The on-site survey shall include a standard-by-standard evaluation.

(3) At the time of the initial on-site survey, the center shall assure that the administrator or his or her designee(s) is present during the survey.

(4) If at the time of the initial on-site survey, the center has not admitted its first client for antepartum, intrapartum, or postpartum care, the center must notify the Manager, Health Facility Compliance Group, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, when the first such admission and care delivery does occur.

(A) Within seven calendar days of the first client admission, the center shall submit a copy of the clinical record to the department for review.

(B) The department shall review the clinical record(s) to evaluate the center's compliance with the care delivery standards of this chapter.

(5) Upon completion of the on-site survey, a department surveyor shall verify a center's compliance with the provisions of the Act and this chapter and recommend to the department:

(A) that the center's initial license be continued for the duration of the initial license period; or

(B) that the department propose an enforcement action.

(c) Subsequent on-site surveys. After the initial on-site survey that is required for an initial license under subsection (b) of this section, an on-site survey shall be performed at least every three years with the following exceptions.

(1) If the department has written deficiencies for the center under the following provisions of this chapter, that may pose a threat to the health and safety of the center's clients and or staff, the department shall conduct another on-site survey no later than one year after issuance of the initial or renewal license:

(A) §137.31 of this title (relating to Operational and Clinical Policies);

(B) §137.32 of this title (relating to Organizational Structure and Delegation of Authority);

(C) §137.33(4) and (5) of this title (relating to Personnel Policies);

(D) §137.34 of this title (relating to Qualifications and Duties of Staff);

(E) §137.36 of this title (relating to Physical and Environmental Requirements for Centers);

(F) §137.37 of this title (relating to Infection Control Standards);

(G) §137.38 of this title (relating to Disposition of Medical Waste);

(H) §137.39 of this title (relating to General Requirements for the Provision and Coordination of Treatment and Services);

(I) §137.40 of this title (relating to Risk Assessments);

(J) §137.41 of this title (relating to Emergency Services);

(K) §137.48 of this title (relating to Labor and Birth Procedures);

(L) §137.49 of this title (relating to Care of the Newborn);

(M) §137.50 of this title (relating to Discharge Procedures); and

(N) §137.55 of this title (relating to Other State and Federal Compliance Requirements).

(2) If the department has taken enforcement action against a center and the action allowed the center to remain licensed, the department shall conduct another on-site survey.

(3) This subsection does not limit complaint surveys by the department.

(d) Survey procedures.

(1) Prior to the survey, the department may notify the applicant or licensee, in writing by fax or mail to the mailing address of the center, of the date and time of the survey. The department is not required to notify the applicant or licensee prior to a complaint investigation.

(2) At the start of the survey, the department's surveyor shall notify the person who is in charge of a center of the nature and scope of the survey.

(3) Except for a complaint investigation or a follow-up visit, a survey will include a standard-by-standard evaluation.

(4) When the survey is completed, the surveyor shall hold an exit conference and fully inform the person who is in charge of the center of the preliminary findings of the survey and shall give the person a reasonable opportunity to submit additional facts or other information to the surveyor in response to those findings. A written response may be filed and must be received by the department within 14 calendar days of receipt of the preliminary findings of the survey by the center. The surveyor shall identify any records that were duplicated. Any original center records that are removed from a center shall be removed only with the consent of the center.

(5) After the survey is completed, the department shall provide the administrator of the center specific and timely written notice

of the findings of the survey within 14 calendar days of the exit conference.

(6) If the department determines that the center is in compliance with minimum standards at the time of the on-site inspection, the department will send a license to the center, if applicable.

(7) If the surveyor determines there are no deficiencies found, a statement shall be provided to the center indicating this fact.

(8) If the surveyor finds there are deficiencies, the center and the department shall comply with the following procedure.

(A) The department shall provide the center with a statement of deficiencies within 14 calendar days of the exit conference.

(B) The center administrator shall sign the written statement of deficiencies and return it to the department with its plan of correction(s) for each deficiency within 14 calendar days of its receipt of the statement of deficiencies. The signature does not indicate the person's agreement with deficiencies stated on the form.

(C) The department shall determine if the written plan of correction is acceptable. If the plan of correction(s) is not acceptable to the department, the department shall notify the center and request that the plan of correction be modified and resubmitted no later than 14 calendar days from the date notified.

(D) The center shall come into compliance in accordance with the plan of correction or no later than 60 calendar days prior to the expiration of the license, whichever is sooner.

(E) Acceptance of a plan of correction by the department does not preclude the department from taking enforcement action as appropriate under §137.22 of this title (relating to License Denial, Suspension, Probation, or Revocation).

(9) The department may refer issues and complaints relating to the conduct or actions by licensed health care professionals to their appropriate boards.

§137.22. License Denial, Suspension, Probation, or Revocation.

(a) The department may deny, suspend, or revoke a license if the licensee or the center:

(1) violates a provision of Texas Birthing Center Licensing Act, Health and Safety Code, Chapter 244;

(2) fails to meet a requirement of this chapter;

(3) fails to comply with an order of the commissioner of health or another enforcement procedure under the Act;

(4) is involved in any action as described in §137.11(a)(3)(J) - (K) of this title (relating to Application Procedures and Issuance of Licenses); or

(5) has been convicted of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a center.

(A) In determining whether a criminal conviction directly relates, the department shall consider the provisions of Texas Occupations Code, Chapter 53.

(B) The department may deny a person a license or suspend or revoke an existing license on the grounds that the person has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the ownership or operation of a facility. The department shall apply the requirements of the Texas Occupations Code, Chapter 53.

(i) The department is entitled to obtain criminal history information maintained by the Texas Department of Public Safety (Government Code, §411.122), the Federal Bureau of Investigation Identification Division (Government Code, §411.087) or any other law enforcement agency to investigate the eligibility of an applicant for an initial or renewal license and to investigate the continued eligibility of a licensee.

(ii) In determining whether a criminal conviction directly relates, the department shall consider the provisions of the Texas Occupations Code, §53.022 and §53.023.

(iii) The following felonies and misdemeanors directly relate because these criminal offenses adversely effect a person's ability to own or operate a facility:

(I) a misdemeanor or felony involving moral turpitude;

(II) a misdemeanor or felony relating to deceptive business practices;

(III) a misdemeanor or felony of practicing any health-related profession without a required license;

(IV) a misdemeanor or felony under any federal or state law relating to drugs, dangerous drugs, or controlled substances;

(V) a misdemeanor or felony under the Texas Penal Code (TPC):

(-a-) Title 4--offenses of attempting or conspiring to commit any of the offenses in this clause;

(-b-) Title 5--offenses against the person;

(-c-) Title 7--offenses against property;

(-d-) Title 8--offenses against public administration;

(-e-) Title 9--offenses against public order and decency;

(-f-) Title 10--offenses against public health, safety or morals; or

(-g-) Title 11--offenses involving organized crime.

(VI) offenses listed in clause (iii) of this subparagraph are not exclusive in that the department may consider similar criminal convictions from other state, federal, foreign or military jurisdictions which indicate an inability or tendency for the person to be unable to own or operate a facility.

(VII) a license holder's license shall be revoked on the license holder's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.

(6) fails to comply with applicable requirements within a designated probation period;

(7) has a history of failure to comply with the rules adopted under this chapter;

(8) has aided, abetted or permitted the commission of an illegal act;

(9) has committed fraud, misrepresentation, or concealment of a material fact on any documents required to be submitted to the department or required to be maintained by the facility pursuant to the provisions of this chapter;

(10) fails to pay administrative penalties; or

(11) fails to implement plans of corrections to deficiencies cited by the department.

(b) Notice. If the department proposes to deny, suspend or revoke a license, the department shall send a notice of the proposed action by certified mail, return receipt requested, at the address shown in the current records of the department or the department may personally deliver the notice. The notice to deny, suspend, or revoke a license shall state the alleged facts or conduct to warrant the proposed action, provide an opportunity to demonstrate or achieve compliance, and shall state that the applicant or license holder has an opportunity for a hearing before the action taken is final.

(c) Within 25 days after the date of the notice, the applicant or license holder may notify the department, in writing, of acceptance of the department's determination. If the applicant or license holder does not accept the proposed action, a hearing may be requested. The request for a hearing must be submitted in writing to the Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756.

(1) A hearing shall be conducted pursuant to the Administrative Procedure Act, Texas Government Code, Chapter 2001 and the department's formal hearing procedures in §§1.21, 1.23, 1.25, and 1.27 of this title (relating to Formal Hearing Procedures).

(2) If the applicant or licensee does not request a hearing in writing within 25 days after the date of the notice, the licensee is deemed to have waived the opportunity for a hearing and the proposed action shall be taken.

(3) If the applicant or licensee fails to appear or be represented at the scheduled hearing, the applicant or licensee is deemed to have waived the right to a hearing and the proposed action shall be taken.

(d) A person who has had a center license revoked under this section may not apply for a license under this chapter for one year following the date of revocation.

(e) Probation. In lieu of suspending or revoking the license, the department may schedule the facility for a probation period of not less than 30 days if the facility is found in repeated noncompliance and the facility's noncompliance does not endanger the health and safety of the public.

(f) After a survey in which deficiencies were cited by the surveyor, a center may submit its license for voluntary cancellation in lieu of the department proceeding with enforcement action. The department may accept such submission or reject it and proceed with an enforcement action. The center, its owner(s), and its affiliates may not reapply for a license for six months from the date of the surrender or expiration.

(g) If the department suspends a license, the suspension shall remain in effect until the department determines that the reason for suspension no longer exists. A department surveyor shall conduct a survey of the center prior to making a determination.

(1) During the time of suspension, the suspended license holder shall return the original license certificate to the department.

(2) If a suspension overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in this chapter; however, the department may not renew the license until the department determines that the reason for suspension no longer exists.

(3) If suspension is for more than one year, the suspended license holder may apply to the department for cancellation of the suspension only after one year following the initial date of the suspension.

(h) If the department denies, revokes, or does not renew a license, a person may reapply for a license (subject to subsection (b) of this section), by complying with the requirements and procedures in this chapter at the time of reapplication. The department may refuse to issue a license if the reason for denial, revocation, or non-renewal continues to exist and may consider the enforcement history of the applicant, administrator or clinical director in making such a determination.

(i) Upon revocation or nonrenewal, a license holder shall return the original license certificate to the department.

§137.23. Emergency Suspension.

(a) The department may issue an emergency order to suspend a license issued under this chapter if the department has reasonable cause to believe that the conduct of a license holder creates an immediate danger to the public health and safety.

(b) On written request of the license holder, the department shall conduct a hearing to determine if the emergency suspension is to continue, to be modified or to be rescinded. The hearing shall not be conducted earlier than the seventh day or later than the 10th day after the date the notice of the emergency suspension is sent to the license holder.

(c) The hearing and any appeal are governed by the department's rules for a contested case hearing and Government Code, Chapter 2001.

§137.24. Administrative Penalties.

(a) Imposition of penalty.

(1) The department may impose an administrative penalty on a person licensed under this chapter who violates the Act, this chapter, or an order adopted under this chapter.

(2) A penalty collected under this section shall be deposited in the state treasury in the general revenue fund.

(3) A proceeding to impose the penalty is considered to be a contested case under Government Code, Chapter 2001.

(b) Amount of penalty.

(1) The amount of the penalty may not exceed $1,000 for each violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty. The total amount of the penalty assessed for a violation continuing or occurring on separate days under this paragraph may not exceed $5,000.

(2) In determining the amount of an administrative penalty assessed under this section, the department shall consider:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(B) the threat to health or safety caused by the violation;

(C) the history of previous violations;

(D) the amount necessary to deter a future violation;

(E) whether the violator demonstrated good faith, including whether the violator made good faith efforts to correct the violation; and

(F) any other matter that justice may require.

(c) Report and notice of violation and penalty.

(1) If the department initially determines that a violation occurred, the department shall give written notice of the report by certified mail to the person alleged to have committed the violation following the survey exit date.

(2) The notice must include:

(A) a brief summary of the alleged violation;

(B) a statement of the amount of the recommended penalty based on the factors listed in subsection (b)(2) of this section; and

(C) a statement of the person's right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(d) Penalty to be paid or hearing requested.

(1) Within 20 calendar days after the date the notice under subsection (c) of this section, is mailed, the person in writing may:

(A) accept the determination and recommended penalty of the department; or

(B) make a request for a hearing on the occurrence of the violation, the amount of the penalty, or both; and

(C) request a pre-hearing conference to discuss the violation.

(2) If the person accepts the determination and recommended penalty or if the person fails to respond to the notice, the commissioner of health (commissioner) or the commissioner's designee by order shall approve the determination and impose the recommended penalty.

(e) Hearing.

(1) If the person requests a hearing, it shall be conducted pursuant to the Administrative Procedure Act, Texas Government Code, Chapter 2001 and the department's formal hearing procedures.

(2) All hearings shall be held in accordance with the requirements of the Health and Safety Code, Chapter 244.

(f) Options following decision: pay or appeal. Within 30 calendar days after the date the order of the commissioner or commissioner's designee that imposes an administrative penalty becomes final, the person shall:

(1) pay the penalty; or

(2) appeal the penalty by filing a petition for judicial review of the commissioner's order contesting the occurrence of the violation, the amount of the penalty, or both; and

(3) all appeals shall be under the substantial evidence rule.

(g) Stay of enforcement of penalty. Stay of enforcement of penalty shall follow the procedures listed in Health and Safety Code, §244.016.

(h) Collection of penalty. Collection of penalty shall follow the procedure listed in Health and Safety Code, §244.016.

(i) Remittance of penalty and interest. The remittance of penalty and interest is governed by Health and Safety Code, §244.016(g).

§137.25. Complaints.

(a) In accordance with §137.42 of this title (relating to Disclosure Requirements), all licensed centers are required to provide a client, and her guardian if the client is a minor or if guardianship is required, at the time of the initial visit, with a written statement that complaints relating to the center may be registered with the Manager, Health Facility Compliance Group, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756; Telephone (888) 973-0022; (512) 834-6650; and Fax (512) 834-6653.

(b) Complaints may be registered with the department by telephone, fax or in writing at the address listed in subsection (a) of this section. A complainant may provide his or her name, address, and phone number to the department. Anonymous complaints may be registered if the complainant provides sufficient information.

(c) The department will evaluate all complaints received.

(d) A complaint containing allegations that are a violation of the Act or this chapter will be investigated by the department.

(e) A department representative (surveyor) may enter the premises of a center at reasonable times as necessary to assure compliance with the Act and this chapter. The department is not required to notify the applicant or licensee prior to a complaint investigation.

(f) If the department determines that the complaint does not come within the department's jurisdiction, the department shall advise the complainant and, if possible, refer the complainant to the appropriate governmental agency for handling such a complaint.

(g) The department shall inform in writing a complainant who identifies himself or herself by name and address of the final disposition of the complaint.

(h) A person may file a complaint with the department against a birthing center licensed under this chapter. A person who files a false complaint may be prosecuted under the Penal Code.

§137.26. Appointment and Qualifications of a Monitor.

(a) The department may appoint a monitor for a birthing center to ensure compliance with this chapter when the center's failure to comply with this chapter creates a serious threat to the health and safety of the public.

(b) The birthing center shall be liable for the cost of the monitor.

(c) The birthing center may propose up to three persons to act as a monitor. The department shall approve the monitor. The monitor shall be an individual or team of individuals, and must include a professional with birthing center experience. The monitor may not be or include individuals who are current or former employees of the birthing center or an affiliated facility. The purpose of the monitor is to observe, supervise, consult, and educate the birthing center employees, and report back to the department according to the terms of the agreed order.

(d) A professional with birthing center experience shall:

(1) have a minimum of three years clinical experience providing care to pregnant women and newborns;

(2) be a certified nurse-midwife, licensed midwife, or physician with obstetrical experience; and

(3) be currently licensed or certified in the State of Texas.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703861
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER D. OPERATIONAL AND CLINICAL STANDARDS FOR THE PROVISION

AND COORDINATION OF TREATMENT AND SERVICES

25 TAC §§137.31 - 137.34, 137.36 - 137.44, 137.46 - 137.55

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeals are authorized by Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The proposed repeals affect the Health and Safety Code, Chapters 12, 244 and 1001; and Government Code, Chapter 531.

§137.31. Operational and Clinical Policies.

§137.32. Organizational Structure and Delegation of Authority.

§137.33. Personnel Policies.

§137.34. Qualifications and Duties of Staff.

§137.36. Physical and Environmental Requirements for Centers.

§137.37. Infection Control Standards.

§137.38. Disposition of Medical Waste.

§137.39. General Requirements for the Provision and Coordination of Treatment and Services.

§137.40. Risk Assessments.

§137.41. Emergency Services.

§137.42. Disclosure Requirements.

§137.43. Prenatal Care.

§137.44. Parenting and Postpartum Counseling.

§137.46. Physician Consultant Procedures.

§137.47. Procedures for Drugs and Biologicals.

§137.48. Labor and Birth Procedures.

§137.49. Care of the Infant.

§137.50. Discharge Procedures.

§137.51. Postpartum and Postnatal Care of the Mother and Infant.

§137.52. Quality Assurance.

§137.53. Clinical Records.

§137.54. Reporting and Filing Requirements.

§137.55. Other State and Federal Compliance Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703862
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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25 TAC §§137.31 - 137.34, 137.36 - 137.44, 137.46 - 137.55

STATUTORY AUTHORITY

The proposed new sections are authorized by Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The proposed new sections affect the Health and Safety Code, Chapters 12, 244 and 1001; and Government Code, Chapter 531.

§137.31. Operational and Clinical Policies.

A center shall develop, implement, and enforce written policies governing the center's total operation and ensure that these policies are administered so as to provide quality health services in a safe environment.

§137.32. Organizational Structure and Delegation of Authority.

(a) A center shall establish a written organizational structure which shall clearly define the lines of authority and the delegation of responsibility for professional and nonprofessional staff.

(b) The center shall appoint an administrator and a clinical director. The administrator and clinical director may be the same person and may be the owner.

(1) The administrator shall be responsible for implementing and supervising the operational policies of the center.

(2) The clinical director shall be responsible for implementing the clinical policies of the center.

(c) The owner of a center is responsible for ensuring total compliance with the Act and the provisions of this chapter.

§137.33. Personnel Policies.

The center shall develop, implement, and enforce written policies governing all personnel staffed by the center. The personnel policies shall cover the following requirements:

(1) job descriptions for all personnel providing client care;

(2) orientation and training of all employees, volunteers, students and contractors;

(3) an annual written evaluation of employee performance;

(4) in-service and continuing education;

(5) certification of all birth attendants by the American Heart Association or the American Red Cross in basic life support for health care providers; and

(6) certification of all birth attendants by the American Academy of Pediatrics or the American Heart Association in neonatal resuscitation.

§137.34. Qualifications and Duties of Staff.

(a) One person may act in the capacity of the administrator, the clinical director, and the birth attendant provided that person meets all the minimum qualifications set out in paragraphs (2)(A) and (3)(A) of this subsection and is capable of performing all of the duties specifically stated in paragraphs (1)(B), (2)(B), and (3)(B) of this subsection. The minimum qualifications and duties for the administrator, the clinical director, the birth attendant, other clinical care providers and nonprofessional personnel of a center are as follows.

(1) Administrator.

(A) Qualifications.

(i) Shall not have been employed in the last year as an administrator with another center or health care facility at the time the center or facility was cited for violations of a licensing law or rule which resulted in enforcement action taken against the center or health related facility. For purposes of this clause only, the term "enforcement action" means license revocation, suspension, emergency suspension, or denial of a license or injunction action but does not include administrative or civil penalties.

(ii) Shall not have been convicted of a felony or misdemeanor listed in §137.22 of this title (relating to License Denial, Suspension, Probation, or Revocation).

(B) Duties.

(i) Administratively supervise the provision of services at the center.

(ii) Organize and direct the center's ongoing functions.

(iii) Employ qualified staff.

(iv) Ensure adequate education and evaluations of staff.

(v) Supervise non-professional staff.

(vi) Implement an effective budgeting and accounting system which must include an auditing system for monitoring state or federal funds. The administrator shall ensure all billings or insurance claims (e.g. Medicaid) submitted are accurate.

(vii) Ensure that issues and complaints relating to the conduct or actions by licensed health care professional(s) are addressed and, if warranted, referred and reported to the appropriate board, and that such review and action taken is documented.

(viii) Administratively conduct or supervise the resolution(s) of complaint(s) received from clients in the delivery of their care or services received at the center.

(2) Clinical director.

(A) Qualifications. A licensed physician, a certified nurse-midwife (CNM), or a licensed midwife.

(B) Duties.

(i) Develop, implement, and monitor the clinical policies of a birthing center and ensure the adherence to these policies.

(ii) Advise and consult with the staff of the center on all matters relating to the clinical management of all clients.

(iii) Supervise all birth attendants and all other persons who provide direct client care.

(iv) Ensure the accuracy of public education information materials and activities in relation to pregnancy and birth, mother and newborn care, and the center.

(3) Birth attendant.

(A) Qualifications. A physician, certified nurse-midwife (CNM), or a licensed midwife.

(B) Duties. Responsible for the clinical care provided to clients of the center.

(4) Other clinical care providers.

(A) Qualifications. Licensed, certified or trained appropriately for the care to be provided. Prior to providing direct client care the clinical director shall verify licensure, certification or competence. Shall be certified in CPR for health care providers.

(B) Duties. Provides care only under the supervision of a birth attendant in accordance with all laws, rules and policies appropriate to his or her professional scope of practice.

(5) Nonprofessional staff.

(A) Qualifications. Nonprofessional staff must be able to demonstrate the knowledge, skills, and abilities of their specified job duty within the center. This staff must be at least 16 years old.

(B) Duties. Responsible for the provision of nonclinical services such as housekeeping, laundry, and sanitation in the operation of the center.

(b) A center shall ensure that its birth attendants meet the following requirements.

(1) Licensed midwives must be licensed in accordance with Texas Midwifery Act, Occupations Code, Chapter 203.

(2) Certified nurse-midwives (CNM) must maintain certification as a CNM as defined in §137.2 of this title (relating to Definitions).

(3) Physicians must maintain current licensure as a physician as defined in §137.2 of this title.

(c) A center shall ensure that the personnel record for each employee includes:

(1) job descriptions for all personnel providing client care;

(2) orientation and training of all employees, volunteers, students and contractors;

(3) an annual written evaluation of employee performance;

(4) in-service and continuing education;

(5) evidence of current certification of all birth attendants by the American Heart Association or the American Red Cross in basic life support and the American Academy of Pediatrics or the American Heart Association in neonatal resuscitation; and

(6) verification of current licensure or a current copy of the license for licensed personnel.

§137.36. Physical and Environmental Requirements for Centers.

The physical and environmental requirements for a center are as follows.

(1) The center shall be located within a recommended 20 minutes but with a required maximum of 30 minutes normal driving time of a referral hospital. The department may approve the location of a center that is located a further distance away if the department finds that the health and safety of the clients of the center will not be adversely affected.

(2) The center must have the capacity to provide clients with liquid nourishment. The center may provide commercially packaged food to clients in individual servings. If other food is provided by the center, it will be subject to the requirements of §§229.161 - 229.173 of this title (relating to Texas Food Establishments).

(3) The center must have a safe and sanitary environment equipped and maintained to protect the health and safety of clients and staff.

(4) The center shall provide clean hand washing facilities for clients and staff including running water and soap.

(5) The center must have two functioning sinks and one toilet.

(6) The center must be equipped with emergency lighting and have a written fire and disaster plan.

(7) The center must have equipment available to sterilize instruments, equipment, and supplies before reuse in the center in accordance with §137.37 of this title (relating to Infection Control Standards).

§137.37. Infection Control Standards.

(a) A center shall develop, implement, and enforce written infection control policies and procedures to minimize the transmission of infection. Policies shall include educational course requirements; cleaning and laundry requirements; and decontamination, disinfection, sterilization, and storage of sterile supplies.

(b) Universal/standard precautions.

(1) Ensure that all staff complies with universal/standard precautions.

(2) Establish procedures for monitoring compliance with universal/standard precautions.

(3) Enforce a policy to ensure compliance of the center and all of the health care workers within the center with the Health and Safety Code, Chapter 85, Subchapter I, concerning the prevention of the transmission of human immunodeficiency virus (HIV) and hepatitis B virus (HBV) by infected health care workers.

(4) Require its health care workers to complete educational course work or training in infection control and barrier precautions, including basic concepts of disease transmission, scientifically accepted principles and practices for infection control and engineering and work practice controls.

(c) Cleaning and laundry.

(1) Adopt policies and procedures on cleaning the center.

(2) Adopt policies and procedures for the handling, processing, storing, and transporting of clean and dirty laundry.

(3) A center may provide cleaning and laundry services directly or by contract in accordance with Occupational Safety and Health Association standards.

(d) Policies shall include receiving, cleaning, decontaminating, disinfecting, preparing and sterilization of critical items (reusable items), as well as those for the assembly, wrapping, storage, distribution, and quality control of sterile items and equipment.

(1) Supervision. Shall be under the supervision of the clinical director.

(2) Quantity of sterile surgical instruments. Ensure that surgical instruments are sufficient in number to meet the needs of the center.

(3) Inspection of surgical instruments.

(A) All instruments shall undergo inspection before being packaged for reuse or storage. Routine inspection of instruments shall be made to assure clean locks, crevices, and serrations.

(B) Inspection procedures shall be thorough and include visual and manual inspection for condition and function.

(i) Cutting edges shall be checked for sharpness; tips shall be properly aligned, and instruments shall be clean and free from buildup of soap, detergent, dried blood, or tissue.

(ii) There shall be no evident cracks or fissures, and the hinges shall work freely.

(iii) There shall be no corrosion or pitting of the finish.

(iv) Rachets shall hold and be routinely tested.

(C) Instruments needing maintenance shall be taken out of service and repaired by a qualified surgical instruments repair person.

(D) Instrument identification shall not damage the instrument or its protective finish or compromise the sterilization process.

(4) Items to be disinfected and sterilized.

(A) Critical items.

(i) Must be sterilized in accordance with this subsection.

(ii) All items that come in contact with a sterile field during an operative procedure must be sterile.

(B) Semi-critical items. High-level disinfection shall be used for semi-critical items.

(C) Noncritical items. Intermediate-level or low-level disinfection shall be used for noncritical items.

(5) Equipment and sterilization procedures. Effective sterilization of instruments depends on performing correct methods of cleaning, packaging, arrangement of items in the sterilizer, and storage. The following procedures shall be included in the written policies as required in this paragraph to provide effective sterilization measures.

(A) Equipment. A center shall provide sterilization equipment adequate to meet the requirements for sterilization of critical items. Equipment shall be maintained and operated to perform, with accuracy, the sterilization of critical items.

(B) Environmental requirements. Where cleaning, preparation, and sterilization functions are performed in the same room or unit, soiled or contaminated supplies and equipment shall

be physically separated from the clean or sterilized supplies and equipment.

(i) A center shall have a sink for hand washing. This sink shall not be used for cleaning instruments or disposal of liquid waste.

(ii) A center shall have a separate sink for cleaning instruments and disposal of liquid waste. Hand washing may only be performed at this sink after it has been disinfected.

(C) Preparation for sterilization.

(i) All items to be sterilized shall be prepared to reduce the bioburden. All items shall be thoroughly cleaned, decontaminated, and prepared in a clean, controlled environment.

(ii) One of the following methods of cleaning and decontamination shall be used as appropriate.

(I) Manual cleaning. Manual cleaning of instruments at the sink is permitted.

(II) Ultrasonic cleaning. The water must be changed more than once a shift. The chambers shall be covered to prevent potential hazards to personnel from aerosolization of the contents.

(III) Washer-sterilizers. These machines must reach a temperature of 140 degrees Celsius (285 degrees Fahrenheit).

(IV) Washer-decontaminator machines.

(iii) All articles to be sterilized shall be arranged so all surfaces will be directly exposed to the sterilizing agent for the prescribed time and temperature.

(D) Packaging.

(i) All wrapped articles to be sterilized shall be packaged in materials recommended for the specific type of sterilizer and material to be sterilized, and to provide an effective barrier to microorganisms. Acceptable packaging includes peel pouches, perforated metal trays, or rigid trays. Muslin packs must be limited in size to 12 inches by 12 inches by 20 inches with a maximum weight of 12 pounds. Wrapped instrument trays must not exceed 17 pounds.

(ii) All items shall be labeled for each sterilizer load as to the date and time of sterilization, the sterilizing load number, and the equipment.

(E) External chemical indicators.

(i) External chemical indicators, also known as sterilization process indicators, shall be used on each package to be sterilized, including items being flash sterilized to indicate that items have been exposed to the sterilization process.

(ii) The indicator results shall be interpreted according to the manufacturer's written instructions and indicator reaction specifications.

(F) Biological indicators.

(i) The efficacy of the sterilizing process shall be monitored with reliable biological indicators appropriate for the type of sterilizer used.

(ii) Biological indicators shall be included in at least one run a month.

(iii) If a test is positive, the sterilizer shall immediately be taken out of service. A malfunctioning sterilizer shall not be put back into use until it has been serviced and successfully tested according to the manufacturer's recommendations.

(iv) All available items shall be recalled and reprocessed if a sterilizer malfunction is found; and a list of all items which were used after the last negative biological indicator test shall be submitted to the administrator.

(G) Sterilizers. Sterilizers shall be used according to manufacturer's written instructions.

(H) Maintenance of sterility.

(i) Items that are properly packaged and sterilized will remain sterile indefinitely unless the package becomes wet or torn, has a broken seal, is damaged in some way, or is suspected of being compromised.

(ii) All packages must be inspected before use. If a package is torn, wet, discolored, has a broken seal, or is damaged, the item may not be used. The item must be returned to sterile processing for reprocessing.

(I) Commercially packaged items. Commercially packaged items are considered sterile according to the manufacturer's instructions.

(J) Storage of sterilized items. The loss of sterility is event-related, not time related. The center shall ensure proper storage and handling of items in a manner that does not aid the compromise of the packaging of the product.

(i) Sterilized items shall be transported so as to maintain cleanliness, sterility, and to prevent physical damage.

(ii) Sterilized items shall be stored in well-ventilated, limited access areas with controlled temperature and humidity.

(iii) Sterilized items shall be positioned so that the packaging is not crushed, bent, compressed, or punctured.

(iv) Storage of supplies shall be in areas that are designated for storage.

(K) Disinfection.

(i) The manufacturer's written instructions for the use of disinfectants shall be followed.

(ii) An expiration date, determined according to manufacturer's written recommendations, shall be marked on the container of disinfection solution currently in use.

(iii) Disinfectant solutions shall be kept covered and used in well-ventilated areas.

(L) Performance records.

(i) Performance records for all sterilizers shall be maintained for each cycle. These records shall be retained and available for review for a minimum of two years.

(ii) Each sterilizer shall be monitored during operation for pressure, temperature, and time at desired temperature and pressure. A record shall be maintained either manually or machine generated and shall include:

(I) the sterilizer identification;

(II) sterilization date and time;

(III) load number;

(IV) duration and temperature of exposure phase;

(V) identification of operator(s);

(VI) results of biological tests and dates performed; and

(VII) time-temperature recording charts from each sterilizer.

(M) Preventive maintenance of all sterilizers shall be performed according to policy on a scheduled basis by qualified personnel, using the sterilizer manufacturer's service manual as a reference. A record shall be maintained for each sterilizer, retained at least two years, and shall be available for review.

§137.38. Disposition of Medical Waste.

A center shall meet requirements set forth by the department in §§1.131-1.137 of this title (relating to Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities).

(1) All special waste including blood, body fluids, placentas, sharps and biological indicators, shall be disposed of in accordance with §§1.131 - 1.137 of this title.

(2) Placentas shall not be placed in the trash or dumpster for disposal.

(3) A center may give the placenta to the client at the time of discharge upon request by the client.

§137.39. General Requirements for the Provision and Coordination of Treatment and Services.

(a) A center shall develop, implement, and enforce policies for the provision and coordination of treatment and services.

(b) The center is responsible for all care provided to center clients on its licensed premises.

(c) A center and the client shall have a written agreement for services. The center shall obtain an acknowledgment of receipt of the agreement. The center shall comply with the terms of the agreement. The written agreement shall include, the following:

(1) services to be provided;

(2) who will provide the services; and

(3) charges for services rendered.

(d) When services are provided through a contract, a center must assure that these services are also provided in a safe and effective manner. If a center utilizes independent contractors, there shall be a written agreement between such independent contractors (i.e., per hour, per visit) and the center. The agreement shall be enforced by the center and clearly designate:

(1) that clients are accepted for care only by the center;

(2) the services to be provided by both parties;

(3) the necessity to conform to the Act, this chapter, and all applicable center policies, including personnel qualifications; and

(4) the manner in which services will be coordinated and evaluated by the center.

(e) A center shall not commit an intentional or negligent act that adversely affects the health or safety of a client.

(f) A center must ensure that its licensed health care professionals practice within the scope of their practice and within the constraints of applicable state laws and regulations governing their practice and must follow the facility's written policies and procedures.

(g) A center may accept student midwives to provide them with clinical experience.

(h) If a center has a contract or agreement with an accredited school of health care to use their center for a portion of a student's clinical experience, those students may provide care under the following conditions.

(1) Students may be used in centers, provided the instructor gives classroom supervision and assumes responsibility for all student activities occurring within the center.

(2) A student may administer medications only if:

(A) on assignment as a student of their school of health care; and

(B) the birth attendant within their licensed scope of practice is on the premises and directly supervises the administration of medication by the student.

(3) Students shall not be considered when determining staffing needs required by the center.

§137.40. Risk Assessments.

(a) Risk assessment system. A center shall adopt, implement, and enforce a written risk assessment system that complies with this section, conforms to accepted standards of practice, and has been approved by the center's clinical director. The center shall apply the risk assessment system to clients prior to acceptance as a center client and throughout the pregnancy for continuation of services and during the postpartum period.

(b) Admission. A birth attendant shall perform the risk assessment of a potential client prior to accepting the client for admission and shall only admit a client that has been assessed to have a low-risk pregnancy.

(c) Change in risk status, transfer, and referral. Criteria for the assessment of a client who develops complications during pregnancy that would require the transfer or referral of the client or newborn from the center shall be reviewed and updated annually by the clinical director.

(1) The center shall recognize and document in the client's clinical record when the client's condition deviates from a low-risk pregnancy at any time during the antepartum, intrapartum, or postpartum period. The center shall refer or transfer the client to a hospital or physician consultant in accordance with the written policies described in paragraph (2) of this subsection.

(2) The center shall enforce policies for the transfer or referral of a client or newborn to a physician consultant or a referral hospital. The written policies shall include provisions:

(A) for transfer to a hospital if emergency care is required;

(B) for notifying the receiving physician prior to the transfer;

(C) for notifying the receiving hospital prior to the transfer;

(D) for sending a copy of the clinical record to the hospital or physician consultant at the time of transfer; and

(E) describing the duties and responsibilities of staff during the transfer procedure.

(3) The center shall document the transfer or referral in the client's clinical record in accordance with §137.53(9)(R) of this title (relating to Clinical Records).

§137.41. Emergency Services.

The center shall provide emergency services to clients when a critical situation develops at the center.

(1) A center shall have an emergency call system for use when there is a critical situation. The center shall have available in the center personnel trained in cardiopulmonary resuscitation (CPR) to be available whenever there is a client in labor or during acute postpartum period.

(2) A center shall provide emergency equipment and emergency medications as follows:

(A) oxygen;

(B) newborn manual breathing bags;

(C) suction equipment for newborns;

(D) a neutral thermal environment for resuscitation; and

(E) other medications and equipment as approved by the clinical director.

§137.42. Disclosure Requirements.

(a) At the time of initial visit a center must provide the client, and if the client is a minor, his or her guardian:

(1) a written statement that complaints may be registered with the Manager, Health Facility Compliance Group, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756; telephone (888) 973-0022; (512) 834-6650; Fax (512) 834-6653; and

(2) a disclosure statement and informed consent that explains the benefits, limitations, and risks of the services available to the client, and that describes the collaborative arrangements that the center has with physicians and referral hospitals.

(b) A center shall ensure that its licensed midwives meet the disclosure requirements in the Texas Midwifery Act, Texas Occupations Code, Chapter 203.

§137.43. Prenatal Care.

When prenatal care is provided, the center shall comply with accepted standards of practice.

§137.44. Parenting and Postpartum Counseling.

(a) A birthing center that provides prenatal care to a pregnant woman during gestation or at delivery of an infant shall:

(1) provide the woman with a resource list of the names, addresses, and telephone numbers of professional organizations that provide postpartum counseling and assistance to parents;

(2) document in the patient's record that the patient received the information described in paragraph (1) of this subsection; and

(3) retain the documentation for at least three years in the birthing center records.

(b) The list must include resources a parent may contact to receive counseling and assistance for postpartum depression and other emotional traumas associated with pregnancy and parenting.

(c) A birthing center that provides prenatal care to a woman during gestation or at delivery is presumed to have complied with this section, if the woman received prior prenatal care from another birthing center, physician, or midwife in this state during the same pregnancy.

§137.46. Physician Consultant Procedures.

(a) A center shall adopt, implement, and enforce written procedures for consultation with physicians for clients who develop medical complications.

(b) A physician consultant shall be a Texas licensed physician, preferably who practices obstetrics and/or pediatrics, and who is readily available by telephone or who is able to be present in the center or hospital to deliver emergency care.

§137.47. Procedures for Drugs and Biologicals.

(a) Drugs and biologicals must be handled and stored in a safe and effective manner in accordance with written policies and procedures established by the center and state and federal laws.

(b) Drugs must be administered according to established written policies and procedures and accepted standards of practice, in accordance with state and federal laws.

§137.48. Labor and Birth Procedures.

(a) Labor and birth shall be managed and attended by a birth attendant.

(b) The birth attendant shall be trained in the use of emergency equipment.

(c) A center shall ensure that its birth attendants encourage a client to seek medical care if the birth attendant recognizes a sign or symptom of a complication to the client's childbirth.

(d) Other clinical care provider(s) and/or a birth attendant, shall be physically present in the center whenever a client is in the center until the client is discharged. The clinical care provider shall be capable of performing the following minimum duties:

(1) monitoring the fetal heartbeat;

(2) monitoring the mother's blood pressure, pulse, and temperature;

(3) performing adult and infant cardiopulmonary resuscitation, if needed;

(4) monitoring the newborn's heart rate, respiratory rate and body temperature; and

(5) assessing the client's fundus and blood loss.

(e) A birth attendant shall be physically present to conduct the delivery and be available during the acute postpartum period.

(f) Interventions shall be limited to those required to accomplish a vaginal delivery.

(g) No general, epidural, or subdural anesthetic agent shall be administered in a center.

§137.49. Care of the Newborn.

A center shall adopt, implement, and enforce written policies and procedures for the care of the newborn. The clinical director shall review and revise the policies as necessary to reflect current practices. The policies shall include the following:

(1) resuscitation of the newborn;

(2) prophylactic treatment of the eyes;

(3) documentation of a physical examination of the newborn performed before discharge;

(4) referral for any abnormalities or problems;

(5) the collection of blood for newborn screening; and

(6) procedures for the detection of Rh and ABO isoimmunization.

§137.50. Discharge Procedures.

(a) The mother and newborn shall be discharged from the center when both are clinically stable and have met discharge criteria established by the center.

(b) The mother and newborn shall not be discharged prior to two hours from the time of placenta.

(c) If the mother or newborn remain at the center for medical reasons for more than 24 hours after birth, a report shall be filed with the Manager, Department of State Health Services, Health Facility Compliance Group, 1100 West 49th Street, Austin, Texas 78756. The report shall be filed within 48 hours after the birth describing the circumstances and reasons for the extended stay.

(d) A center must provide the mother with written discharge instructions. The discharge instructions must include written guidelines detailing how the mother may obtain emergency assistance for herself and newborn.

§137.51. Postpartum and Postnatal Care of the Mother and Newborn.

The center shall develop, implement, and enforce written policies to provide follow-up postnatal and postpartum care to the newborn and the mother either directly or by referral. Follow-up care may be provided in the center, at the mother's residence, by telephone, or by a combination of these methods in accordance with accepted standards of practice.

§137.52. Quality Assurance.

(a) Quality assurance program. The center shall adopt, implement, and enforce a written quality assurance (QA) program that includes all health and safety aspects of client care for both mother and newborn.

(1) The quality assurance program shall include, but not be limited to:

(A) a review of the clinical record(s);

(B) incidences of morbidity and mortality of mother and newborn;

(C) postpartum infections;

(D) all cases transferred to a hospital for delivery, care of newborn, or postpartum care of mother;

(E) incidents, problems and potential problems identified by staff of the center, including infection control;

(F) address issues of unprofessional conduct by any member of the center's staff (including contract staff);

(G) address the integrity of surgical instruments, medical equipment, and patient supplies;

(H) address client referrals and consultations;

(I) address medication therapy practices, if applicable; and

(J) problems with compliance with any federal and state laws and rules.

(2) This program must be reviewed and updated or revised at least annually.

(3) The results of the quality assurance program must be reviewed and documented at least quarterly.

(b) Quality assurance issues. The center shall identify and address quality assurance issues and implement corrective action plans as necessary. The outcome of any corrective action plans shall be documented. The outcome of the remedial action shall be documented.

(c) Departmental review.

(1) A representative(s) of the department shall verify that the center has a quality assurance program which addresses quality concerns and that center staff know how to access that process.

(2) Attempts by the center to identify and correct deficiencies will not be used by the department as a basis for adverse action against the center.

§137.53. Clinical Records.

The center must adopt, implement, enforce and maintain a clinical record system to assure that the care and services provided to each client is completely and accurately documented, and systematically organized to facilitate the compilation and retrieval of information. At the time of an on-site survey, all clinical records shall be readily retrievable for review within two hours of the request.

(1) For each client, a center may keep a single file or separate files for each stage of service provided to the client.

(2) The center shall have written procedures which are adopted, implemented, and enforced regarding the removal of records and the release of information. A center shall not release any portion of a client record to anyone other than the client except as allowed by law.

(3) All information regarding the client's care and services shall be centralized in the client's record and be protected against loss or damage.

(4) The center shall establish an area for client record storage at the center's place of business. The client record shall be stored at the place of business from which services are actually provided.

(5) The center shall ensure that each client's record is treated with confidentiality, safeguarded against loss and unofficial use, and is maintained according to professional standards of practice.

(6) The clinical record shall be an original, a microfilmed copy, an optical disc imaging system, or a certified copy. An original record includes manually signed paper records or electronically signed computer records. Computerized records shall meet all requirements of paper records including protection from unofficial use and retention for the period specified in paragraph (10) of this subsection. Systems shall assure that entries regarding the delivery of care or services may not be altered without evidence and explanation of such alteration.

(7) Each entry to the client record shall be accurate, signed, and dated with the date of entry by the individual making the entry. Correction fluid or tape shall not be used in the record. Corrections shall be made by striking through the error with a single line and shall include the date the correction was made and the initials of the person making the correction.

(8) Inactive client records may be preserved and stored on microfilm, optical disc or other electronic means. Security shall be maintained and records must be readily retrievable by the center within two hours of a request for a record(s) by the department.

(9) The clinical record must contain the following:

(A) client identifying information;

(B) name of the client's birth attendant(s) and the name of all other clinical care providers;

(C) initial risk assessment;

(D) a disclosure statement and informed consent that is signed by a client that explains the benefits, limitations, and risks of the services available to them at the center, and that describes the col-

laborative arrangements that the center has with physicians and with referral hospitals;

(E) the informed choice agreement required to be given a client by a licensed midwife, if applicable;

(F) record of antepartum (prenatal) care;

(G) history and physical examination of the clients;

(H) laboratory procedures;

(I) progress notes shall be written, signed and dated by the person rendering the service on the day service is rendered and incorporated into the client record on a timely basis;

(J) medication list and medication administration record, if applicable;

(K) intrapartum care;

(L) newborn care;

(M) postpartum care;

(N) allergies and medication reactions;

(O) documentation for consultation;

(P) refusal of the client to comply with advice or treatment;

(Q) discharge summary;

(R) documentation of client transfers or referrals, if applicable; and

(S) documentation that:

(i) a birth certificate was filed; or

(ii) if applicable, a death certificate was filed.

(10) A center shall retain original client records for a minimum of five years after the discharge of the client. The center may not destroy client records that relate to any matter that is involved in litigation if the center knows the litigation has not been finally resolved.

(11) If a center closes, there shall be an arrangement for the preservation of inactive records to ensure compliance with this section. The center shall send the department written notification of the reason for closure, the location of the client records and the name and address of the client record custodian. If a center closes with an active client roster, a copy of the active client record shall be transferred with the client to the receiving center or other health care facility in order to assure continuity of care and services to the client.

§137.54. Reporting and Filing Requirements.

(a) Reportable conditions and incidents.

(1) A center shall report communicable diseases required to be reported under the Health and Safety Code, §81.042, and in accordance with the department's rules under §§97.2 - 97.5 of this title (relating to Control of Communicable Diseases).

(2) The following incidents shall be reported to the department in writing, by mail, or fax within five calendar days of the occurrence to the Manager of Health Facility Compliance Group, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756:

(A) a death of a client, newborn, or death of a fetus during the course of labor occurring in the center; and

(B) a death of a client or newborn occurring within 24 hours of discharge from the center or transfer to another health care facility.

(b) Birth certificate filing requirements.

(1) A center administrator or his or her designee shall:

(A) file a birth certificate for each birth at the center; or

(B) ensure that its birth attendants file the birth certificate in accordance with the Health and Safety Code, §192.003.

(2) A center administrator, his or her designee, or any of its birth attendants shall comply with Health and Safety Code, §195.003 and §195.004.

(c) Death certificate filing requirements. A center administrator or birth attendant shall file a death certificate in accordance with subsection (a)(2) of this section.

(d) Data collection for birth defects. If the department requires data collection concerning birth defects under the Health and Safety Code, §87.022, the center or its birth attendants shall make available for review by the department or by an authorized agent clinical records or other information that are in the center's or birth attendant's custody or control and that relate to the occurrence of a birth defect specified by the board.

§137.55. Other State and Federal Compliance Requirements.

(a) A center utilizing the services of a licensed midwife shall ensure that all licensed midwives utilized do not violate the Texas Midwifery Act, Texas Occupations Code, Chapter 203, concerning prohibited acts and criminal penalties, while functioning in his or her capacity at or for the center.

(b) A center shall ensure that its licensed midwives comply with Title 22 Texas Administrative Code, Chapter 831 (relating to Midwifery), while functioning in his or her capacity at or for the center.

(c) A center that provides laboratory services shall meet the Clinical Laboratory Improvement Amendments of 1988 (CLIA 88), 42 Code of Federal Regulations, §§493.1 - 493.1780 (CLIA 1988). CLIA 1988 applies to all centers with laboratories that examine human specimens for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings. If a center accepts laboratory test results from another state or foreign country, such as Mexico, the laboratory documents must be reviewed and approved by a licensed health professional within his or her scope of practice.

(d) A center utilizing the services of a registered nurse(s) shall ensure that its registered nurse(s) comply with the Nursing Practice Act, Texas Occupations Code, Chapters 301, 303, and 304, while functioning in his or her capacity at or for the center.

(e) A center utilizing the services of a licensed vocational nurse(s) shall ensure that its licensed vocational nurse(s) comply with Texas Occupations Code, Chapters 301, 303, and 304, while functioning in his or her capacity at or for the center.

(f) A center utilizing the services of a physician(s) shall ensure that its physician(s) comply with the Medical Practice Act, Texas Occupations Code, Chapters 151 - 165, while functioning in his or her capacity at or for the center.

(g) A center utilizing the services of a physician assistant(s) shall ensure that its physician assistant(s) comply with the Physician Assistant Licensing Act, Texas Occupations Code, Chapter 204, while functioning in his or her capacity at or for the center.

(h) A center that provides pharmacy services shall obtain a license as a pharmacy if required by the Texas Pharmacy Act, Texas Occupations Code, Chapters 551 - 569.

(i) A center shall not use adulterated or misbranded drugs or devices in violation of the Health and Safety Code, §431.021. Adulterated drugs and devices are described in Health and Safety Code, §431.111. Misbranded drugs or devices are described in Health and Safety Code, §431.112.

(j) A center shall not commit a false, misleading, or deceptive act or practice as that term is defined in the Deceptive Trade Practices-Consumer Protection Act, Business and Commerce Code, §17.46.

(k) A birthing center must provide voluntary paternity establishment services in accordance with:

(1) the Health and Safety Code, §192.012, Record of Acknowledgment of Paternity; and

(2) the rules of the Office of the Attorney General found at 1 Texas Administrative Code, Chapter 55, Subchapter J (relating to Voluntary Paternity Acknowledgment Process).

(l) A birthing center shall comply with Health and Safety Code, Chapter 47, relating to Hearing Loss in Newborns.

(m) A center shall ensure that its birth attendants comply with Health and Safety Code, §81.090 (relating to Serologic Testing During pregnancy). The center shall ensure that the results of any HIV test are kept confidential pursuant to the Health and Safety Code, §81.103.

(n) A center shall ensure that its birth attendants comply with the Health and Safety Code, §81.091, (relating to Ophthalmia Neonatorum Prevention; Criminal Penalty).

(o) A center shall ensure that its birth attendants cause the newborn screening tests to be performed as required by:

(1) the Health and Safety Code, §33.011 (relating to Test Requirement); and

(2) Texas Occupations Code, §203.354 (relating to Newborn Screening).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703863
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 140. HEALTH PROFESSIONS REGULATION

SUBCHAPTER E. RESPIRATORY CARE

25 TAC §§140.201 - 140.216

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §§140.201 - 140.216, concerning the regulation and certification of respiratory care practitioners.

BACKGROUND AND PURPOSE

The proposed new rules are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC Chapter 140, Health Professions Regulation. The new rules transfer and update existing language, and do not impose any new requirements or fees on applicants or licensees. One change affects continuing education. In response to stakeholder input, licensees will be able to take more continuing education hours through self-directed study (including Internet based courses). The current rules allow up to six hours each renewal period; the new rules will permit up to 12 of the required 24 hours to be taken as self-directed study.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 123.1 - 123.16 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the department is proposing to repeal the existing sections and adopt the rules in 25 TAC Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

New §140.201 sets forth purpose and scope of the rules. New §140.202 includes definitions for terms used within the rules. New §140.203 covers the membership and operations of the advisory committee. New §140.204 lists the fees required for application, registration, upgrade, renewal, and issuance of a duplicate certificate. New §140.205 cover exemptions from certification as a respiratory care practitioner, including the definition of a student. New §140.206 describes the procedures and criteria for approval or disapproval of an application by the department. New §140.207 explains the types of certificates and temporary permits and applicant eligibility for respiratory care practitioners. New §140.208 sets forth information concerning the procedures for examination eligibility for respiratory care practitioners. New §140.209 provides timelines for the processing of renewal and late renewal applications, and sets forth the requirements for inactive status, the provision of renewal for voluntary charity care and military status. New §140.210 sets forth continuing education requirements and the self-directed study hours, including Internet-based or computer based studies increases the number of acceptable hours from six to twelve hours during each renewal period. New §140.211 covers procedures for changes of name and address. New §140.212 establishes professional and ethical standards for respiratory care practitioners. New §140.213 concerns certifying or permitting persons with criminal backgrounds. New §140.214 sets out violations and prohibited actions, procedures concerning complaints, and actions the department may take against a person when violations have occurred. New §140.215 covers the informal disposition of any complaint or contested case. New §140.216 explains suspension of a license relating to child support and child custody.

FISCAL NOTE

Debbie Peterson, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five-year period that the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Peterson has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This determination was made because the new rules do not impose any new requirements. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Peterson has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the certification and regulation of respiratory care practitioners.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the pubic health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Pam K. Kaderka, Program Director, Respiratory Care Practitioners Certification Program, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6634 or by e-mail to Pam.Kaderka@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed new rules are authorized by Occupations Code, §604.052, which authorizes the adoption of rules for the regulation of respiratory care practitioners; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed new rules affect the Occupations Code, Chapter 604; Government Code, Chapter 531; and Health and Safety Code, Chapter 1001.

§140.201. Purpose and Scope.

These sections cover definitions; the advisory committee; fees; exceptions to certification; application requirements and procedures; types of certificates, temporary permits, and applicant eligibility; examination; certificate renewal; continuing education requirements; changes of name or address; professional and ethical standards; certifying or permitting persons with criminal background to be respiratory care practitioners; violations, complaints and subsequent actions; informal dispositions; and suspension of license relating to child support and child custody.

§140.202. Definitions.

The following words and terms when used in these sections, shall have the following meanings, unless the content clearly indicates otherwise:

(1) AARC--The American Association for Respiratory Care and its predecessor or successor organizations.

(2) Act--Texas Occupations Code, Chapter 604.

(3) Advisory committee--The Respiratory Care Practitioners Advisory Committee.

(4) Aides/orderlies--Health care workers who perform routine tasks under the direct supervision of a respiratory care practitioner such as transporting patients, assembling treatment equipment, preparing work areas, and other assigned duties. Aides/orderlies may not perform respiratory care procedures.

(5) AMA--The American Medical Association.

(6) Applicant--A person who applies to the Department of State Health Services for a certificate or temporary permit.

(7) Appropriate educational agency--The Texas Education Agency or other governmental agency authorized by law or statute to approve educational institutions and curriculum, or an educational accrediting body of a professional organization, such as the Committee on Accreditation for Respiratory Care (COARC) and its predecessor or successor organization.

(8) Certificate--A respiratory care practitioner certificate issued by the Department of State Health Services.

(9) Commissioner--The commissioner of the Department of State Health Services.

(10) Delegated authority--As defined in the Texas Medical Practice Act, Texas Occupations Code, Chapter 157 and the rules pertaining thereto adopted by the Texas Medical Board.

(11) Department--The Department of State Health Services.

(12) Diagnostic--Of or relating to or used in the art or act of identifying a disease or disorder.

(13) Educational accrediting body--The Committee on Allied Health Education and Accreditation of the American Medical Association, or its successor organization which approves respiratory care education programs.

(14) Executive Commissioner--Executive Commissioner of Health and Human Services Commission.

(15) Formally trained--Completion of an organized educational activity which:

(A) includes supervised and directed instruction specific to the respiratory care procedures to be performed by the individual;

(B) includes specific objectives, activities, and an evaluation of competency; and

(C) is supervised and directed by another individual qualified to provide the training and supervision.

(16) NBRC--The National Board for Respiratory Care, Inc., and its predecessor or successor organizations.

(17) Palliative--Serving to moderate the intensity of pain or other disease process.

(18) Practice--Engaging in respiratory care as a clinician, educator, or consultant.

(19) Qualified medical director--A physician licensed and in good standing with the Texas Medical Board, and who has special interest and knowledge in the diagnosis and treatment of respiratory care problems and who is actively engaged in the practice of medicine. This physician must be a member of the active medical staff of a health care facility, agency or organization who supervises the provision of respiratory care.

(20) Respiratory care--The treatment, management, control, diagnostic evaluation, and care of inpatients or outpatients who have deficiencies and abnormalities associated with the cardiorespiratory system. Respiratory care does not include the delivery, assembly, set up, testing, and demonstration of respiratory care equipment upon the order of a licensed physician. Demonstration is not to be interpreted here as the actual patient assessment and education, administration, or performance of the respiratory care procedure(s).

(21) Respiratory care education program--

(A) a program in respiratory care approved by the educational accrediting body;

(B) a program approved by an appropriate education agency and working toward becoming an approved program in respiratory care. A program will qualify as a respiratory care education program under this subparagraph only for a period of one year from the date of the first class offered by the program; after that one year, the program must be an approved program in respiratory care; or

(C) a program accredited by the Canadian Medical Association and whose graduates are eligible to take the national registry exam given by the Canadian Board of Respiratory Care.

(22) Respiratory care practitioner (RCP)--A person permitted or certified under the Act to practice respiratory care.

(23) Respiratory care procedure--Respiratory care provided by the therapeutic and diagnostic use of medical gases, the delivery of humidification and aerosols, the administration of drugs and medications to the cardiorespiratory system, ventilatory assistance and ventilatory control, postural drainage, chest drainage, chest percussion or vibration, breathing exercises, respiratory rehabilitation, cardiopulmonary resuscitation, maintenance of natural airways, and the insertion and maintenance of artificial airways. The term includes a technique employed to assist in diagnosis, monitoring, treatment, and research, including the measurement of ventilatory volumes, pressures and flows, the specimen collection of blood and other materials, pulmonary function testing, and hemodynamic and other related physiological forms of monitoring or treating, as ordered by the patient's physician, the cardiorespiratory system. These procedures include:

(A) administration of medical gases--such as nitric oxide, helium and carbon dioxide;

(B) providing ventilatory assistance and ventilatory control--including high frequency oscillatory ventilation and high frequency jet ventilation;

(C) providing artificial airways--including insertion, maintenance and removal;

(D) performing pulmonary function testing--including neonatal and pediatric studies;

(E) hyperbaric oxygen therapy;

(F) monitoring--including pulse oximeter, end-tidal carbon dioxide and apnea monitoring;

(G) extracorporeal membrane oxygenation (ECMO);

(H) patient assessment, respiratory patient care planning; and

(I) implementation of respiratory care protocols.

(24) Temporary permit--A permit issued in accordance with §140.207(d) of this title (relating to Types of Certificates, Temporary Permits, and Applicant Eligibility) for a period of six months.

(25) TMB--Texas Medical Board.

(26) Therapeutic--Of or relating to the treatment of disorders by remedial agents or methods.

(27) Under the direction--Assuring that established policies are carried out; monitoring and evaluating the quality, safety, and appropriateness of respiratory care services and taking action based on findings; and providing consultation whenever required, particularly on patients receiving continuous ventilatory or oxygenation support.

§140.203. Respiratory Care Practitioners Advisory Committee.

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) The name of the committee shall be the Respiratory Care Practitioners Advisory Committee (committee).

(2) The committee is established under Government Code, §531.012, which allows the Executive Commissioner of the Health and Human Services Commission to appoint advisory committees as needed.

(b) Applicable law. The committee is subject to Government Code, Chapter 2110, concerning state agency advisory committees.

(c) Purpose. The purpose of the committee is to recommend rules and examinations for the approval of the Executive Commissioner of the Health and Human Services Commission.

(d) Tasks.

(1) The committee shall advise the Executive Commissioner of the Health and Human Services Commission concerning rules relating to the certification of respiratory care practitioners.

(2) The committee shall carry out any other tasks given to the committee by the Executive Commissioner of the Health and Human Services Commission.

(e) Review and duration. By November 1, 2011, the Executive Commissioner of the Health and Human Services Commission will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition. The committee shall be composed of nine members appointed by the Executive Commissioner of the Health and Human Services Commission. The composition of the committee shall include:

(1) three consumer representatives;

(2) three physicians with an interest in the practice of respiratory care; and

(3) three certified respiratory care practitioners.

(g) Terms of office. The term of office for each member shall be six years, and members shall serve after expiration of their term until a replacement is appointed.

(1) Members shall be appointed for staggered terms so that the terms of three members will expire on January 1st of each even-numbered year.

(2) If a vacancy occurs, a person shall be appointed to serve the unexpired portion of that term.

(h) Officers. The committee shall select from its members the presiding officer and an assistant presiding officer to begin serving on November 1 of each odd-numbered year.

(1) Each officer shall serve until October 31 of each odd-numbered year. Each officer may continue to serve until his or her replacement is elected.

(2) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the Executive Commissioner of the Health and Human Services Commission. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer will complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled by vote of the committee.

(5) A member shall serve no more than two consecutive terms as presiding officer and/or assistant presiding officer.

(6) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(i) Meetings. The committee shall meet only as necessary to conduct committee business.

(1) A meeting may be called by agreement of the Department of State Health Services (department) staff and either the presiding officer or at least three members of the committee.

(2) Meeting arrangements shall be made by department staff. Department staff shall contact committee members to determine availability for a meeting date and place.

(3) The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4) Each member of the committee shall be informed of a committee meeting at least five working days before the meeting.

(5) A simple majority of the members of the committee shall constitute a quorum for the purpose of transacting official business.

(6) The committee is authorized to transact official business only when in a legally constituted meeting with quorum present.

(7) The agenda for each committee meeting shall include an item entitled public comment under which any person will be allowed to address the committee on matters relating to committee business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(j) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

(1) A member shall notify the presiding officer or appropriate department staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent from more than half of the committee and subcommittee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a member exists.

(k) Staff. Staff support for the committee shall be provided by the department.

(l) Procedures. Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) Any action taken by the committee must be approved by a majority vote of the members present once quorum is established.

(2) Each member shall have one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting shall be taken by department staff. After approval by the committee, the minutes shall be signed by the presiding officer.

(m) Subcommittees. The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

(1) The presiding officer shall appoint members of the committee to serve on subcommittees and to act as subcommittee chairpersons. The presiding officer may also appoint nonmembers of the committee to serve on subcommittees.

(2) Subcommittees shall meet when called by the subcommittee chairperson or when so directed by the committee.

(3) A subcommittee chairperson shall make regular reports to the committee at each committee meeting or in interim written reports as needed. The reports shall include an executive summary or minutes of each subcommittee meeting.

(n) Statement by members.

(1) The Executive Commissioner of the Health and Human Services Commission, department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the Executive Commissioner of the Health and Human Services Commission, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the Executive Commissioner of the Health and Human Services Commission, department or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(3) A committee member should not accept or solicit any benefit that might reasonably tend to influence the member in the discharge of the member's official duties.

(4) A committee member should not disclose confidential information acquired through his or her committee membership.

(5) A committee member should not knowingly solicit, accept, or agree to accept any benefit for having exercised the member's official powers or duties in favor of another person.

(6) A committee member who has a personal or private interest in a matter pending before the committee shall publicly disclose the fact in a committee meeting and may not vote or otherwise participate in the matter. The phrase "personal or private interest" means the committee member has a direct pecuniary interest in the matter but does not include the committee member's engagement in a profession, trade, or occupation when the member's interest is the same as all others similarly engaged in the profession, trade, or occupation.

(o) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, §2110.004, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

(1) No compensatory per diem shall be paid to committee members unless required by law.

(2) A committee member who is an employee of a state agency, other than the department, may not receive reimbursement for expenses from the department.

(3) A nonmember of the committee who is appointed to serve on a subcommittee may not receive reimbursement for expenses from the department.

(4) Each member who is to be reimbursed for expenses shall submit to staff the member's receipts for expenses and any required official forms no later than 14 days after each committee meeting.

(5) Requests for reimbursement of expenses shall be made on official state travel vouchers prepared by department staff.

(p) Impartiality and Nondiscrimination. The committee shall make no decision in the discharge of its statutory authority with regard to any person's race, religion, color, gender, national origin, age, disability, sexual orientation, genetic information, or family health history.

§140.204. Fees.

The following fees are required to be paid to the department before any certificate or permit is issued. All fees shall be submitted in the form of a check or money order and are nonrefundable. The department may direct examination applicants to submit examination fees to the National Board for Respiratory Care, Inc. (NBRC).

(1) Schedule of fees for certification as a respiratory care practitioner:

(A) application (includes initial certificate) fee--$120;

(B) renewal fee for a license issued for a two-year term is $100;

(C) renewal fee for a license issued to a retired respiratory care practitioner performing voluntary charity care for a two-year term is $50;

(D) certificate and/or identification card replacement fee--$20;

(E) NBRC examination fee--the fee designated by the NBRC at the time of examination or reexamination;

(F) certificate fee for upgrade of temporary permit--$30;

(G) written verification of certification status--$10;

(H) returned check fee--$50;

(I) annual inactive status fee--$25;

(J) reinstatement fee for a license that was suspended for failure to pay child support--$50;

(K) one to 90 days late renewal fee--one and one half times the normally required renewal fee;

(L) 91 days to one year late renewal fee--two times the normally required renewal fee;

(M) for all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online; and

(N) for all applications and renewal applications, the department is authorized to collect fees to fund the Office of Patient Protection, Health Professions Council, as mandated by law.

(2) Schedule of fees for a temporary permit as a respiratory care practitioner:

(A) application (including initial permit) fee--$50;

(B) temporary permit renewal fee--$20;

(C) temporary permit and/or identification card replacement fee--$20;

(D) written verification of certification status--$10;

(E) returned check fee--$50.

(3) Any certificate holder whose check to the department is returned marked insufficient funds, account closed, or payment stopped shall remit to the department a money order or check for guaranteed funds in the amount of the check submitted to the department plus the returned check fee within 30 days of the date of receipt of the department's notice. Failure to comply with this requirement may be the grounds for disciplinary action, up to and including denial of the certificate holder application or the revocation of the certificate. If a certificate is issued or renewed or an application processed upon the submission of a check to the department, and if such check is later returned unpaid, the department may cancel the certificate or application if the certificate holder or applicant does not redeem the check in compliance

with this section. The effect of such a cancellation shall be the same as if the application for renewal or for licensure had not been submitted.

(4) If the department's notice, as set out in paragraph (3) of this section, is returned unclaimed, the department shall mail the notice to the applicant or certificate holder by first class mail. If a money order or check for guaranteed funds is not received by the department's cashier within 30 days of the postmarked date on the second mailing, the approval or certificate issued shall be invalid. The department shall notify the applicant's or certificate holder's employer that the person has failed to comply with this section.

(5) The department shall make periodic reviews of the fee schedule and recommend any adjustments necessary to provide sufficient funds to meet the expenses of the respiratory care practitioner certification program without creating an unnecessary surplus. Such adjustments shall be made through rule amendments approved by the Executive Commissioner of the Health and Human Services Commission.

§140.205. Exemptions.

(a) Except as specifically exempted by subsection (b) of this section, the provisions of the Act and this chapter apply to any person representing that he or she practices or provides respiratory care services.

(b) This section does not prohibit:

(1) the practice of respiratory care that is an integral part of the program of study by a student enrolled in a respiratory care education program approved by the department;

(2) the employment by a health care facility of a person to deliver limited respiratory care support services under the supervision of an individual who holds a certificate issued under this Act, if such a person does not perform an invasive procedure related to critical respiratory care, including therapeutic, diagnostic, or palliative procedures as part of the person's employment and if the person:

(A) is enrolled for credit in the clinical portion of an approved respiratory care education program; or

(B) has completed all of the clinical portion of an approved respiratory care education program within the preceding 12 months and is actively pursuing a course of study leading to graduation from the program;

(3) the gratuitous care of the ill by a friend or member of the family or care provided in an emergency situation by a person who does not claim to be a respiratory care practitioner who holds a temporary permit or certificate issued under the provisions of the Act;

(4) a respiratory care practitioner from performing advances in the art and techniques of respiratory care, as defined in the Act and in §140.202 of this title (relating to Definitions), learned through formal or specialized training;

(5) the practice of respiratory care by health care personnel who have been formally trained in the care being provided and who are:

(A) licensed under the practice acts regulating their professions; or

(B) acting under the delegated authority of a physician licensed by the Texas Medical Board;

(6) the practice of any legally qualified respiratory care practitioner employed by the United States government while in the discharge of official duties; or

(7) any person who is licensed, registered, or certified under another law of this state from engaging in the profession or occupation for which the person is licensed, registered, or certified.

(c) Student status.

(1) Students who are not enrolled in the clinical portion or have not completed the clinical portion of their respiratory care education program within the preceding 12 months may not be employed by a health care facility to provide limited respiratory care services unless they hold a temporary permit.

(2) Students in a nontraditional accredited respiratory care education program may be considered as being engaged in the clinical portion of their education program during its entire duration. For the purposes of this section nontraditional shall mean those respiratory care education programs recognized as nontraditional education systems by the Committee on Accreditation for Respiratory Care or its successor organization.

(3) A clinical student who is employed by any health care facility, agency or organization to provide limited respiratory care services should provide his or her employer, on a semi-annual basis, verification that he or she is a bona fide student in an approved respiratory care education program. Acceptable verification shall be a letter on program letterhead with the original signature of the program director attesting to the student's bona fide status as an active student in the clinical portion of that program or that the student has completed the clinical portion of the course within the preceding 12 months and is actively pursing a course of study leading to graduation from the program.

(4) Limited respiratory care services provided by an employed clinical student must be supervised by a practitioner certified under this Act. Students may not perform invasive procedures related to critical respiratory care.

(5) Students who are within 30 days of graduation may apply to the department for a temporary permit in accordance with §140.206 of this title (relating to Application Requirements and Procedures). A person who holds a temporary permit may perform any and all respiratory care procedures which he or she has been trained to perform.

(d) All persons who apply to become certified or permitted as a practitioner, all persons who believe they are exempt under the Act and this chapter, and all other persons who are interested in practicing respiratory care need to be aware that:

(1) the penalty provisions under the Texas Occupations Code §604.351, state that a person who commits an offense if the person knowingly violates a provision of the Act and commits a Class B misdemeanor; and

(2) a person who does not hold a certificate or temporary permit under this chapter as a respiratory care practitioner or whose certificate or permit has been suspended or revoked may not use in connection with the person's practice or employment the words "respiratory care," "respiratory therapist," "respiratory care practitioner," "certified respiratory care practitioner," or the letters "RCP," or any other words, letters, abbreviations, or insignia indicating or implying that the person is a respiratory care practitioner.

§140.206. Application Requirements and Procedures.

(a) General.

(1) Unless otherwise indicated, an applicant must submit all required information and documentation of credentials on official department forms.

(2) The department shall not consider an application as officially submitted until the applicant pays the application fee and the fee clears the appropriate financial institution. The fee must accompany the application form.

(3) The administrator shall send a notice listing the additional materials required to an applicant who does not complete the application in a timely manner. An application not completed within 30 days after the date of the notice shall be invalid.

(b) Required application materials.

(1) Application form. The application form shall contain:

(A) specific information regarding personal data, social security number, birth month and day, place of employment, other state licenses and certifications held, misdemeanor and felony convictions, educational and training background, and work experience;

(B) a statement that the applicant has read the Act and these sections and agrees to abide by them;

(C) the applicant's permission to the department to seek any information or references it deems fit to determine the applicant's qualifications;

(D) a statement that the applicant, if issued a certificate or temporary permit, shall return the certificate or temporary permit and identification card(s) to the department upon the revocation or suspension of the certificate or temporary permit;

(E) a statement that the applicant understands that fees submitted are nonrefundable;

(F) a statement that the applicant understands that materials submitted become the property of the department and are nonreturnable (unless prior arrangements have been made);

(G) a statement that the information in the application is truthful and that the applicant understands that providing false information of any kind may result in the voiding of the application and failure to be granted a certificate or permit, or the revocation of a certificate or permit issued;

(H) a statement that if issued a certificate or permit the practitioner shall keep the department advised of his or her current mailing address; and

(I) the signature of the applicant which has been dated.

(2) Educational record for regular certification. The department shall issue a regular certificate to an applicant who is currently credentialed by the National Board for Respiratory Care (NBRC) and nationally certified as a Certified Respiratory Therapist (CRT), or a Registered Respiratory Therapist (RRT) upon payment of the application fee, submission of the application forms and approval by the department.

(3) Education record for temporary permit. Individuals applying for a temporary permit who do not meet the requirements of subsection (b) of this section shall provide the following documents to the department.

(A) An expected graduation statement, including the expected date of graduation, signed by the respiratory care program director at the school.

(B) Within 30 days following the expected date of graduation, the applicant must provide to the department:

(i) a copy of the certificate of completion; or

(ii) a statement signed by the program director indicating that the applicant officially completed the program but the certificate is not available within 30 days of the completion date.

(4) Examination results.

(A) If the applicant is making application for a temporary permit, an examination score release form shall be signed allowing the department to obtain the applicant's examination results from the NBRC, or other agency administering the examination prescribed by the department.

(B) If an applicant for a regular certificate is:

(i) recognized as a certified respiratory therapist or registered respiratory therapist by the NBRC at the time of application, a photocopy of the certificate issued by NBRC shall be submitted in lieu of examination results; or

(ii) unable to show proof of successful completion or otherwise provide documentation acceptable to the department of the applicant's examination results, the application shall be disapproved.

(5) Documentation of prior employment/experience. Persons applying for any certificate or permit who are not recognized as a certified respiratory therapist or registered respiratory therapist by the NBRC and who are licensed, registered, or otherwise regulated in another state, territory, or country at the time of application must submit with their applications documentation of their employment/experience statement signed by their medical director attesting that the applicant is currently practicing, or has practiced respiratory care within the 12-month period immediately preceding application to the department.

(c) Information on other licenses held. Persons applying for any certificate or permit who are licensed, registered, or otherwise regulated in any profession at the time of application to the department must submit with their applications proof of good standing signed by an agency official.

(d) Application processing.

(1) Time periods. The department shall comply with the following procedures in processing applications for a permit or certificate.

(A) The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. A written notice stating that the application has been approved may be sent in lieu of the notice of acceptance of a complete application. The time periods are as follows:

(i) letter of acceptance of application for permit or certification--14 working days. The notice of acceptance may include a statement that an application for temporary permit received more than 30 days from the date of the applicant's graduation will be held pending until the applicant is within 30 days of graduation; and

(ii) letter of application deficiency--14 working days.

(B) The following periods of time shall apply from the receipt of the last item necessary to complete the application until the date of issuance of written notice approving or denying the application. The time periods for denial include notification of the proposed decision and of the opportunity, if required, to show compliance with the law, and of the opportunity for a formal hearing. The time periods are as follows:

(i) letter of approval--14 working days; and

(ii) letter of denial of permit or certificate--90 working days.

(2) Reimbursement of fees.

(A) In the event an application is not processed in the time periods stated in paragraph (1) of this subsection, the applicant has the right to request reimbursement of all fees paid in that particular application process. Requests for reimbursement shall be made to the department. If the department does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the request will be denied.

(B) Good cause for exceeding the time period is considered to exist if the number of applications for licensure and licensure renewal exceeds by 15% or more the number of applications processed in the same calendar quarter the preceding year, another public or private entity relied upon by the department in the application process caused the delay, or any other condition exists giving the department good cause for exceeding the time period.

(3) Contested cases. The time periods for contested cases related to the denial of licensure renewals are not included with the time periods stated in paragraph (1) of this subsection. The time period for conducting a contested case hearing runs from the date the department receives a written request for a hearing and ends when the decision of the department is final and appealable.

(e) Application approval.

(1) The department shall be responsible for reviewing all applications.

(2) The department shall approve all applications which are in compliance with subsections (a) - (c) of this section and which properly document applicant eligibility, unless the application is disapproved under the provisions of subsection (f) of this section.

(f) Disapproved applications. The department shall disapprove the application if the person:

(1) has not completed the requirements in subsection (b) of this section;

(2) has failed to pass the examination as set out in §140.208 of this title (relating to Examination) during the period for which the temporary certificate, or temporary permit was valid, if applicable;

(3) has failed to remit any applicable fees required in §140.204 of this title (relating to Fees);

(4) has failed or refused to properly complete or submit any application form(s) or endorsement(s), or presented false information on the application form, or any other form or document required by the department to verify the applicant's qualifications;

(5) has been in violation of the Act, §140.214 of this title (relating to Violations, Complaints, and Subsequent Actions), the code of ethics as set out in §140.212 of this title (relating to Professional and Ethical Standards), or any other applicable provision of this chapter;

(6) has been convicted of a felony or misdemeanor, if the crime directly relates to the duties and responsibilities of a respiratory care practitioner as set out in §140.213 of this title (relating to Certifying or Permitting Persons with Criminal Backgrounds to be Respiratory Care Practitioners);

(7) holds a license, certification, or registration to practice respiratory care in another state or jurisdiction and that license, certification, or registration has been suspended, revoked, or otherwise restricted by the licensing entity in that state or jurisdiction for reasons to the person's professional competence or conduct which could adversely affect the health and welfare of a patient;

(8) is not currently practicing, or has not practiced within the 12-month period preceding the date of application, respiratory care, as set out in §140.207(d)(1)(B) of this title (relating to Types of Certificates, Temporary Permits, and Applicant Eligibility); or

(9) has submitted a copy of a National Board for Respiratory Care, Inc. (NBRC) certificate in lieu of examination results in accordance with subsection (b)(4)(B)(i) of this section, but is not recognized by the NBRC as a certified respiratory therapist or registered respiratory therapist.

(g) Application Denial. The department shall deny renewal if required by the Education Code, §57.491 (relating to Defaults on Guaranteed Student Loans).

(1) If after review the department determines that the application should not be approved, the department shall give the applicant written notice of the reason for the proposed decision and of the opportunity for a formal hearing. The formal hearing shall be conducted according to the Administrative Procedure Act, Texas Government Code Chapter 2001, et seq. Within 10 days after receipt of the written notice, the applicant shall give written notice to the department that the applicant either waives the hearing, or wants the hearing. Receipt of the written notice is deemed to occur on the tenth day after the notice is mailed unless another date of receipt is reflected on a United States Postal Service return receipt. If the applicant fails to respond within 10 days after receipt of the notice of opportunity, or if the applicant notifies the department that the hearing be waived, the applicant is deemed to have waived the hearing. If the hearing has been waived, the department shall disapprove the application.

(2) An applicant whose application has been disapproved under subsection (f)(5) and (6) of this section shall be permitted to reapply after a period of not less than one year from the date of the disapproval and shall submit with the reapplication proof satisfactory to the department of compliance with all rules of the department and the provisions of the Act in effect at the time of reapplication. The date of disapproval is the effective date of a disapproval order signed by the commissioner of the Department of State Health Services or the commissioner's designee.

§140.207. Types of Certificates, Temporary Permits, and Applicant Eligibility.

(a) General. This section sets out the types of certificates and permits issued, and the qualifications of applicants for certification as respiratory care practitioners.

(1) The department shall prepare and provide to each respiratory care practitioner a certificate or temporary permit with an identification card which contains the practitioner's name, certificate or permit number, and date of certificate or permit issue. The temporary permit and all identification cards shall indicate an expiration date.

(2) Any certificate or permit and identification cards issued by the department remain the property of the department and shall be surrendered to the department on demand.

(3) Employers shall keep on file an unaltered photocopy of the practitioner's original certificate or permit and current identification card.

(4) Neither the practitioner nor anyone else shall display or present to another person, employer or potential employer a certificate or permit or carry an identification card which has been photocopied or otherwise reproduced.

(5) Neither the practitioner nor anyone else shall make any alteration on any certificate, permit, or identification card issued by the department.

(b) Issuance of certificates and permits.

(1) The department shall send each applicant whose application has been approved a certificate or temporary permit and identification card(s) with a certificate or permit number.

(2) Certificates shall expire on the last day of the practitioner's birth month.

(c) Replacements. The department shall replace a lost, damaged, or destroyed certificate or temporary permit and/or identification card(s) upon a written request from the practitioner and payment of the replacement fee.

(d) Applicant eligibility.

(1) Temporary permit. Temporary permits are valid for a six-month period. The department shall issue a temporary permit to practice respiratory care to:

(A) an applicant who:

(i) has applied on the forms prescribed by the department;

(ii) has paid the prescribed application fee;

(iii) will complete a respiratory care education program within 30 days after the date of issuance of the permit or is a graduate of a respiratory care education program approved by the department; and

(iv) meets all qualifications for a certificate except taking the written examination prescribed by the department for certification. An applicant may file an application if he or she is within 30 days prior to graduation. A temporary permit is valid for six months from date of issuance by the department. After the applicant passes the examination, as set out in §140.208 of this title (relating to Examination), and pays the prescribed fee, a regular certificate shall be issued and the temporary permit shall become null and void; or

(B) an applicant who has applied on the forms prescribed by the department; who has paid the prescribed application fee; who is currently practicing respiratory care or has within the 12-month period immediately preceding the date of the application to the department practiced respiratory care in another state, territory, or country; who holds a valid license or other form of registration to practice respiratory care in that state, territory, or country; who is in good standing in that state, territory, or country and who is not recognized, at the time of application to the department, as a certified respiratory therapist or registered respiratory therapist by the National Board for Respiratory Care, Inc. (NBRC).

(2) Regular certificate. The department shall issue a regular certificate to practice respiratory care to an applicant who has applied on a form prescribed by the department, who has paid the prescribed application fee and who:

(A) has, prior to making application to the department, passed the entry level certified respiratory therapist examination administered by or under the auspices of the NBRC with a score equal to or exceeding the pass rate determined by the NBRC at the time of examination or reexamination;

(B) has, prior to making application to the department, passed the registered respiratory therapist (RRT) examination administered by or under the auspices of the NBRC;

(C) holds a valid temporary permit and who has passed, prior to the expiration of the temporary permit, the examination as set out in §140.208 of this title; or

(D) has completed the education requirements as set out in §140.206 of this title (relating to Application Requirements and Procedures) and who has passed the examination as set out in §140.208 of this title.

(3) Out-of-State License/Certification/Registration. The department shall issue a regular certificate to practice respiratory care to an applicant who is in good standing and holds a valid license or other form of registration to practice respiratory care in another state, territory, or country, whose requirements for licensure or certification were at the time of approval substantially equal to the requirements set forth in the Act and this chapter, and who:

(A) has applied on forms prescribed by the department;

(B) has paid the prescribed application fee;

(C) at the time of application to the department, has completed the educational requirements as set out in §140.206 of this title;

(D) has passed the examination, as set out in §140.208 of this title, with a score equal to or exceeding the pass rate determined by the department at the time the application for certification is submitted to the department;

(E) Documentation of prior employment/experience. Persons applying for any certificate or permit who are not recognized as a certified respiratory therapist or registered respiratory therapist by the NBRC and who are licensed, registered, or otherwise regulated in another state, territory, or country at the time of application must submit with their applications documentation of their employment/experience statement signed by their medical director attesting that the applicant is currently practicing, or has practiced respiratory care within the 12-month period immediately preceding application to the department.

(F) has submitted proof on a form prescribed by the department that the applicant is in good standing and holds a valid license or other form of registration to practice respiratory care in another state, territory, or country.

§140.208. Examination.

(a) Examination eligibility. Holders of temporary permits are allowed to take the examination provided the holder complies with the requirements of the Act and these sections. Persons who are certified or registered in respiratory care by the NBRC at the time of application to the department are not required to be reexamined for state certification.

(b) Approved examination. The approved examination for all applicants consists of an entry level certified respiratory therapist (CRT) examination administered for the National Board for Respiratory Care, Inc. (NBRC) or its designee, or the advisory committee may recommend an equivalent examination.

(c) Standards of acceptable performance. The cut-score determined by the NBRC at the time of examination or reexamination shall be the cut-score utilized by the department to determine pass or fail performance.

(d) Completion of application forms. Each applicant shall be responsible for completing and submitting appropriate application forms and paying appropriate fees by the deadlines set by the NBRC, if an NBRC examination is required.

(e) Results.

(1) Results of an examination prescribed by the department but administered under the auspices of another agency will be communicated to the applicant by the department, unless the contract between the department and that agency provides otherwise.

(2) The applicant or temporary permit holder is responsible for arranging to have examination scores forwarded to the department. If the score report does not come directly from the NBRC in writing, the results shall be in the form of a copy of the original of either:

(A) a letter, or other official notification, from the examining agency to the examinee; or

(B) the CRT certificate issued by the NBRC.

(3) If the examination is graded by a national or state testing service, or by the NBRC or its designee, the department shall notify each examinee of the examination results within 14 days of the date the department receives the results.

(4) If the examination is graded by the department or its designee, the department shall notify each examinee of the results of the examination within 60 days of the date of the exam. If the results will be delayed for more than 60 days after the examination, the department shall notify each applicant of the reason for the delay.

(5) If the department is required to provide official notice of examination results to the applicant, no matter what numerical or other scoring system is used in arriving at examination results, the results shall be stated in terms of pass or fail.

(f) Refunds. Examination fee refunds to persons who fail to appear for the examination will be in accordance with policies and procedures of the NBRC, or other agency approved by the department to administer an examination prescribed in this section.

§140.209. Certificate Renewal.

(a) General. Except as provided by subsection (b) of this section, a practitioner shall renew the certificate biennially on or before the last day of the practitioner's birth month.

(1) The renewal date of a certificate shall be the last day of the practitioner's birth month.

(2) Each practitioner shall be responsible for renewing the certificate on or before the expiration date and shall not be excused from paying reinstatement fees. Failure to receive notification from the department prior to the expiration date will not excuse failure to file for renewal or reinstatement.

(3) The department may not renew the certificate or permit of the practitioner who is in violation of the Act or board rules at the time of application for renewal.

(4) The department shall deny renewal of a certificate or permit if renewal is prohibited by the Education Code, §57.491, concerning guaranteed student loan defaults.

(b) Staggered renewals. The department shall use a staggered system for certificate renewals.

(c) Certificate renewal.

(1) At least 30 days prior to the expiration date of a person's certificate, the department shall send notice to the practitioner of the expiration date of the certificate, the amount of the renewal fee due, and a renewal form which the practitioner must complete and return to the department with the required renewal fee.

(2) The renewal form for all practitioners shall require the provision of the preferred mailing address, primary employment address and telephone number, misdemeanor and felony convictions, and continuing education completed.

(3) A practitioner has renewed the certificate when the department has received the completed renewal form, continuing education as set out in §140.210 of this title (relating to Continuing Education Requirements), and the required renewal fee on or prior to the expiration date of the certificate. The postmark date shall be considered as the date of mailing.

(4) The department shall issue identification cards for the current renewal period to a practitioner who has met all requirements for renewal.

(5) A temporary permit may be renewed once for an additional six-month period.

(d) Late renewal or reapplication.

(1) A person whose certificate has expired may renew the certificate by submitting to the department the renewal form, continuing education as set out in §140.210 of this title completed since the last renewal, and if respiratory care procedures were performed after the certificate expired, a statement indicating how the person complied with the Act, §604.003.

(A) If renewal is requested from one day up to 90 days after expiration, the applicant shall submit a fee that is equal to one and one half times the renewal fee, as set out in §140.204 of this title (relating to Fees).

(B) If renewal is requested more than 90 days after expiration but less than one year after expiration, the applicant shall submit a fee that is equal to two times the renewal fee, as set out in §140.204 of this title.

(C) After the certificate is renewed, the next continuing education reporting period starts on the date the certificate is renewed and continues until the next expiration date.

(2) A person whose certificate has been expired for one year or more may apply for a new certificate by complying with the then-current requirements for obtaining a certificate.

(3) After a certificate is expired and until a person has renewed the certificate, a person may not practice respiratory care in violation of the Act.

(4) A person who fails to renew a certificate within one year may obtain a new certificate without examination if the person:

(A) pays a fee that is equal to two times the renewal fee;

(B) is currently certified as a respiratory care practitioner in another state;

(C) has been practicing respiratory care in the state where the certification is held for the two years preceding the date of application for renewal; and

(D) submits proof of completion of the continuing education requirements as set out in §140.210 of this title within the 24-month period preceding the date of the renewal application.

(e) Renewal Processing.

(1) The department shall issue a renewal certificate within 14 days after receipt of documentation of all renewal requirements.

(2) The reimbursement of fees, appeals, and contested cases relating to renewals shall be governed by the provisions of §140.206(d)(2) - (3) of this title (relating to Application Requirements and Procedures).

(f) Military duty. If a practitioner fails to timely renew his or her permit or certificate because the practitioner is or was on active duty with the armed forces of the United States of America, serving outside the State of Texas, the practitioner may renew the permit or certificate pursuant to this subsection.

(1) Renewal of the permit or certificate may be requested by the practitioner, the practitioner's spouse, or an individual having power of attorney from the practitioner. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(2) Renewal may be requested before or after expiration of the permit or certificate.

(3) A copy of the official orders or other official military documentation showing that the practitioner is or was on active duty, serving outside the State of Texas, shall be filed with the department along with the renewal form.

(4) A copy of the power of attorney from the practitioner shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this subsection.

(5) A practitioner renewing under this subsection shall pay the renewal fee.

(6) A practitioner renewing under this subsection is not required to submit continuing education.

(g) Inactive status. A respiratory care practitioner who holds a certificate under the Act and who is not actively engaged in the practice of respiratory care may make application to the department in writing on a form prescribed by the department to be placed on an inactive status list maintained by the department. The application for inactive status and the inactive fee must be postmarked prior to the expiration of the respiratory practitioner's annual certificate. No refund will be made of any fees paid prior to application for inactive status.

(1) A person on inactive status is required to pay an annual inactive status fee as set out in §140.204 of this title.

(2) A person on inactive status may not perform any activities regulated under this Act. Practice as a respiratory care practitioner in any capacity for compensation or as a volunteer is prohibited, and the person may not use the title respiratory care practitioner while on inactive status.

(3) A person on inactive status is not required to complete the requirements in accordance with §140.210 of this title, except when returning to active practice as provided in paragraph (8)(D) of this subsection.

(4) Inactive status shall not be granted to a person whose certificate is not current and in good standing. Inactive status periods shall not exceed five years past the expiration date of the certificate, unless an extension for a longer period is specifically authorized by the department.

(5) The person on inactive status shall be notified annually that in order for the certificate to remain on inactive status, the inactive status notice shall be completed, signed and dated, and the inactive status fee shall be submitted to the department.

(6) A certificate that is not reactivated within the five-year period cannot be renewed, restored, reissued or reinstated. If the person wishes to practice, he or she may reapply for the certificate and meet the current requirements for certification.

(7) A person on inactive status is subject to investigation and action under §140.214 of this title (relating to Violations, Complaints, and Subsequent Actions).

(8) If a person on inactive status desires to reenter active practice, the person shall:

(A) notify the department in writing;

(B) complete appropriate forms;

(C) pay a renewal fee for the current renewal period; and

(D) submit to the department proof of successful completion, within 24-month period prior to reentering active status, of the continuing education hours as set out in §140.210 of this title.

(h) Expiration of certificate. A person whose certificate has expired may not use the title or represent or imply that he has the title of certified respiratory care practitioner, respiratory care practitioner, or respiratory therapist, or use the letters RCP, and may not use any facsimile of those titles in any manner.

(i) Renewal for retired respiratory care practitioners performing voluntary charity care.

(1) A "retired respiratory care practitioner" is defined as a person who is:

(A) above the age of 55;

(B) is not employed for compensation in the practice of respiratory care; and

(C) has notified the department in writing of his or her intention to retire and provide only voluntary charity care.

(2) "Voluntary charity care" for the purposes of this subsection is defined as the practice of respiratory care by a retired respiratory care practitioner without compensation or expectation of compensation.

(3) A retired respiratory care practitioner providing only voluntary charity care may renew his or her license by submitting a renewal form; the retired respiratory care practitioner renewal fee required by §140.204 of this title; and the continuing education hours required by §140.210 of this title.

§140.210. Continuing Education Requirements.

(a) General. Continuing education requirements for renewal shall be fulfilled each renewal period.

(1) The initial period shall begin with the date the department issues the certificate and end on the last day of the birth month at the time of renewal.

(2) A respiratory care practitioner must complete 24 hours of continuing education acceptable to the department during each renewal period.

(3) A clock hour shall be 50 minutes of attendance and participation in an acceptable continuing education experience.

(4) A retired respiratory care practitioner who is approved by the department for renewal in accordance with §140.209(i) of this title (relating to Certificate Renewal) may complete reduced continuing education requirements equal to half of the number of continuing education hours required for renewal for a certified respiratory care practitioner.

(b) Types of acceptable continuing education. Continuing education must be in skills relevant to the practice of respiratory care and

must have a direct benefit to patients and clients and shall be acceptable if the experience falls in one or more of the following categories:

(1) respiratory care course work seminars, workshops, review sessions, or other organized educational programs completed at or though any respiratory care education program;

(2) participation in any program (e.g., in-service educational training programs, institutes, seminars, workshops and conferences) which is:

(A) directly related to the profession of respiratory care;

(B) instructor directed; and

(C) approved, recognized, accepted, or assigned continuing education credits by professional organizations or associations or offered by a federal, state, or local government entity.

(3) instruction or teaching in programs set out in paragraphs (1) and (2) of this subsection.

(4) up to twelve credit hours during each renewal period of self-directed study to include Internet-based or computer-based studies, journals, including a post-test, which meets the requirements described in paragraph (2)(A) and (C) of this subsection.

(c) Determination of clock hours. The department shall credit continuing education experiences as follows.

(1) Completion of course work at or through a respiratory care educational program as set out in subsection (b)(1) of this section shall be credited on the basis of 15 clock hours for each semester hour successfully completed for credit or audit, evidenced by a certificate of successful completion or official transcript.

(2) Parts of programs, activities, workshops, seminars, sessions, etc., which meet the criteria of subsection (b)(1) or (2) of this section shall be credited on a one-for-one basis with one clock hour for each clock hour spent in the continuing education activity.

(3) Teaching in programs which meet the department's criteria as set out in subsection (b)(3) of this section shall be credited on the basis of two clock hours for each hour actually taught. Continuing education credit will be given only once for teaching a particular course.

(4) Passing the certified respiratory therapist recredentialing examination shall be credited on the basis of ten clock hours.

(5) Passing the written registry examination for advanced respiratory therapy practitioners for credentialing or recredentialing shall be credited on the basis of nine clock hours.

(6) Passing the registered respiratory therapist clinical simulation examination for credentialing or recredentialing shall be credited on the basis of nine clock hours.

(7) Passing the National Board for Respiratory Care, Inc. (NBRC) pediatric specialty examination shall be credited on the basis of ten clock hours.

(8) Successful completion of the initial course in advanced cardiac life-support, pediatric advanced life-support, the neonatal advanced life-support course, basic trauma life-support, or pre-hospital trauma life-support shall be credited on the basis of 12 clock hours. Recertification courses shall be credited for the number of hours actually completed during the recertification course, but shall not count for more than 12 hours.

(9) Passing the certification examination for entry level pulmonary function technologists or the registry examination for advanced pulmonary function technologists for credentialing shall be credited on the basis of ten clock hours.

(10) Passing the registration examination offered by the Board of Registered Polysomnographic Technologists shall be credited on the basis of ten clock hours.

(d) Reporting of continuing education. Each practitioner shall be responsible for reporting to the department the continuing education activities completed.

(1) A practitioner shall report the number of hours of continuing education completed during the renewal period. If requested by the department, each practitioner shall submit proof of completion of the required continuing education activity to the department at the time of certificate renewal, or at other times as directed by the department.

(2) If required by the department, each continuing education activity filed by a practitioner must be accompanied by appropriate documentation of the continuing education claimed as follows:

(A) for a program attended, signed certification by a program leader or instructor of the practitioner's participation in the program by certificate, or letter on letterhead of the sponsoring agency, or official continuing education validation form or official transcript of the sponsoring agency accompanied by a brochure, agenda, program, or other applicable information, indicating content of the program;

(B) for teaching or instruction in approved programs, a letter on sponsoring agency's letterhead giving name of program, location, dates, and subjects taught, and giving total clock hours of teaching or instruction;

(C) for completion of course work at or through respiratory care education programs, a certificate of successful completion or an official transcript.

(e) Activities unacceptable as continuing education. The department may not grant continuing education credit to any practitioner for:

(1) education incidental to the regular professional activities of a practitioner such as learning occurring from experience or research;

(2) organization activity such as serving on committees or councils or as an officer in a professional organization;

(3) any program or activity which is not approved in accordance with subsection (b)(2) of this section;

(4) any experience which does not fit the types of acceptable continuing education in subsection (b) of this section;

(5) activities which have been completed more than once during the continuing education period.

(f) Failure to complete required continuing education. A practitioner who has failed to complete the requirements for continuing education as specified in subsection (a) of this section shall return the certificate and identification cards to the department and shall not advertise or represent himself or herself as a respiratory care practitioner in any manner. The person may renew the certificate in accordance with §140.209(d) of this title or reapply for a new certificate.

(g) Other miscellaneous provisions.

(1) Audiovisual programs may be accepted by the department if such a program represents one of the instructional methods or strategies rather than constituting the entire program and provided the program meets the criteria as set out in subsection (b) of this section.

(2) A practitioner who also holds a current license, registration, or certification in another health care profession or a current license, registration, or certification as a respiratory care practitioner in another state, territory, or country may satisfy the continuing education requirements for renewal in Texas with hours counted toward renewal of another license, registration, or certification as long as all of the hours meet all of the requirements of this section.

(3) Continuing education extensions are based on hardships and will be considered and granted by the department on a case by case basis.

(4) The department may conduct random audits of continuing education completed by practitioners to determine compliance with this section.

(5) No continuing education hours may be carried over from one renewal period to another renewal period.

§140.211. Changes of Name or Address.

(a) The practitioner shall notify the department of changes in name, preferred mailing address, or place(s) of business or employment within 30 days of such change(s).

(b) Notification of address changes should be made in writing, including the name, mailing address, and zip code.

(c) All notices required by this chapter shall be addressed to the last known preferred mailing address of the practitioner or applicant.

(d) Before any certificate or permit and identification cards will be issued by the department, notification of name changes must be mailed to the department and shall include a copy of a marriage certificate, court decree evidencing such change, or a social security card reflecting the new name. The practitioner shall remit the appropriate replacement fee as set out in §140.204 of this title (relating to Fees).

§140.212. Professional and Ethical Standards.

The purpose of this section shall be to establish the standards of professional and ethical conduct required of a respiratory care practitioner pursuant to the Act, §604.201(b)(4).

(1) Professional representation and responsibilities.

(A) A practitioner shall not misrepresent any professional qualifications or credentials or provide any information that is false, deceptive, or misleading to the department, for employment or work assignment as a respiratory care practitioner, or fail to disclose any information that could affect the decision to employ or assign a task as a respiratory care practitioner.

(B) A practitioner shall not make any false or misleading claims about the efficacy of any services or methods of treatment.

(C) A practitioner shall not extend his or her practice beyond his or her competence and authority vested in him or her by a physician or this Act.

(D) A practitioner shall not permit the use of his or her name for the purpose of documenting that respiratory care services have been rendered unless that practitioner has provided those services.

(E) A practitioner shall not promote or endorse products, services, or equipment in a manner that is false and misleading.

(F) A practitioner shall maintain knowledge and skills for continuing professional competence. A practitioner shall participate in continuing education programs and activities as set out in §140.210 of this title (relating to Continuing Education Requirements).

(G) A practitioner shall not use alcohol or any drugs in any manner which detrimentally affects the provision of respiratory care.

(H) A practitioner shall have the responsibility of reporting alleged misrepresentations or violations of the Act or these sections to the department.

(I) The practitioner shall be responsible for competent and efficient performance of his assigned duties and shall report to the department incompetence and illegal or unethical conduct of members of the profession.

(J) A practitioner shall not retaliate against any person who reported in good faith to the department alleged incompetence; illegal, unethical, or negligent conduct of any practitioner; or alleged misrepresentation or any violation(s) of the Act or these sections.

(K) A practitioner shall keep his or her file updated by notifying the department of changes in preferred mailing address and telephone number.

(L) A practitioner shall not make any false, misleading, or deceptive claims in any advertisement, announcement, presentation, or in competitive bidding.

(M) A practitioner shall conform to medically accepted principles and standards of respiratory care which are generally recognized by the profession as appropriate for the situation presented, including those promulgated or interpreted by or under the American Association for Respiratory Care, the National Board for Respiratory Care, the Texas Society for Respiratory Therapy, the department, and other professional or governmental bodies.

(N) A practitioner shall not delegate respiratory care functions or responsibilities to a person who lacks the ability or knowledge to perform the function or responsibility. A practitioner providing respiratory care services may be assisted by an aide or orderly. Aides, orderlies and other unlicensed assistive personnel may not perform respiratory care procedures.

(O) A practitioner shall not leave an assignment without being properly relieved by appropriate personnel.

(P) The department shall consider the failure of a practitioner to respond to a request for information or other correspondence relating to the certification process or these sections as unprofessional conduct and grounds for disciplinary proceedings in accordance with §140.214 of this title (relating to Violations, Complaints and Subsequent Actions).

(Q) A practitioner shall not employ another person in the capacity of a respiratory care practitioner who does not hold a certificate or permit to practice respiratory care.

(R) A respiratory care practitioner shall not falsify or make grossly incorrect, grossly inconsistent, or unintelligible entries in a patient, hospital or other record.

(S) A respiratory care practitioner shall not exhibit a pattern of substandard care in the performance of duties related to the practice of respiratory care.

(T) A respiratory care practitioner shall not change the prescription of a physician or falsify verbal or written orders for treatment diagnostic regimen received, whether or not that action resulted in actual patient harm.

(2) Relationships with patients/clients.

(A) A practitioner shall make known to a prospective patient the important aspects of the professional relationship, including

fees and arrangement for payment which might affect the decision to enter into a contractual relationship.

(B) A practitioner shall not receive or give a commission or rebate or any other form of direct or indirect remuneration or benefit for the referral of patients/clients for professional services.

(C) A practitioner shall disclose to patients or clients any interest in commercial enterprises which the practitioner promotes through patients or clients for the purpose of direct or indirect personal gain or profit.

(D) A practitioner shall not accept gratuities for preferential consideration of the patient. The practitioner shall guard against conflicts of interest.

(E) A practitioner shall take reasonable action to inform a patient's/client's physician and any appropriate allied health care provider in cases where a patient's/client's cardiorespiratory status indicates a change in medical status.

(F) A practitioner shall not violate any provision of any federal or state statute relating to confidentiality of patient/client communication and/or records. All inquiries shall be referred to the physician in charge of the patient's medical care.

(G) A practitioner shall not engage in any activities that seek to meet the practitioner's personal needs at the expense or detriment of a patient/client.

(H) A practitioner shall practice respiratory care only under the direction of a qualified medical director or other physician licensed by the Texas Medical Board. For the purpose of this section direction shall mean:

(i) assuring that established policies are carried out;

(ii) monitoring and evaluating the quality, safety, and appropriateness of respiratory care services and taking action based on findings; and

(iii) providing consultation whenever required, particularly on patients receiving continuous ventilatory or oxygenation support.

(I) A practitioner or temporary permit holder shall not engage in sexual conduct with a client, patient, co-worker, employee, staff member, contract employee, practitioner, temporary permit holder or any other person on the premises of any job establishment. For the purposes of this section, sexual conduct includes:

(i) any touching of any part of the genitalia or anus;

(ii) any touching of the breasts of a female except as necessary for the performance of a respiratory care procedure as defined in §140.202 of this title (relating to Definitions);

(iii) any offer or agreement to engage in any activity described in this subsection;

(iv) kissing without the consent of both persons;

(v) deviate sexual intercourse, sexual contact, sexual intercourse, indecent exposure, sexual assault, prostitution, and promotion of prostitution as described in the Texas Penal Code, Chapters 21, 22, and 43, or any offer or agreement to engage in any such activities;

(vi) any behavior, gestures, or expressions which may reasonably be interpreted as inappropriately seductive or sexual; or

(vii) inappropriate sexual comments, including making sexual comments about a person's body.

(3) Billing information required; prohibited practice.

(A) On the written request of a client, a client's guardian, or a client's parent, if the client is a minor, a practitioner shall provide, in plain language, a written explanation of the charges for respiratory care services previously made on a bill or a statement for the client. This requirement applies even if the charges are to be paid by a third party.

(B) A practitioner may not persistently or flagrantly overcharge or overtreat a client.

(4) Sanctions. A practitioner shall be subject to disciplinary action by the department if the practitioner is issued a public letter of reprimand, is assessed a civil penalty by a court, or has an administrative penalty imposed by the attorney general's office under the Crime Victims Compensation Act, Code of Criminal Procedure, Article 56.31 et seq.

(5) Disclosure. A practitioner shall make a reasonable attempt to notify each client of the name, mailing address, and telephone number of the department for the purpose of directing complaints to the department by providing notification:

(A) on each written contract for services of a practitioner;

(B) on a sign prominently displayed in the primary place of business of each practitioner; or

(C) in a bill for service provided by a practitioner to a client or third party.

(6) Unlawful, false, misleading, or deceptive advertising.

(A) A practitioner shall not use advertising that is false, misleading, or deceptive or that is not readily subject to verification.

(B) False, misleading, or deceptive advertising or advertising that is not readily subject to verification includes advertising that;

(i) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(ii) makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;

(iii) compares a health care professional's services with another health care professional's services unless the comparison can be factually substantiated;

(iv) contains a testimonial;

(v) causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;

(vi) advertises or represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;

(vii) advertises or represents that the benefits of a health benefit plan will be accepted full payment when deductibles or copayments are required;

(viii) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of patient; or

(ix) advertises or represents in the use of a professional name a title or professional identification that is expressly or commonly reserved to or used by another profession or professional.

A "health care professional" includes a certified respiratory care practitioner, temporary permitted respiratory care practitioner, or any other person licensed, certified, or registered by the state in a health-related profession.

§140.213. Certifying or Permitting Persons with Criminal Backgrounds to be Respiratory Care Practitioners.

(a) Criminal convictions which directly relate to the profession of respiratory care.

(1) The department may suspend or revoke any existing certificate or permit, disqualify a person from receiving any certificate or permit, or deny to a person the opportunity to be examined for a certificate because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a respiratory care practitioner.

(2) In considering whether a criminal conviction directly relates to the occupation of a respiratory care practitioner, the department shall consider:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the purposes for certification as a respiratory care practitioner. The following felonies and misdemeanors relate to any certificate or permit of a respiratory care practitioner because these criminal offenses indicate an inability or a tendency to be unable to perform as a respiratory care practitioner:

(i) the misdemeanor of knowingly or intentionally acting as a respiratory care practitioner without any certificate or permit under the Texas Occupations Code, §604.352;

(ii) any misdemeanor and/or felony offense involving moral turpitude by statute or common law;

(iii) a misdemeanor or felony offense under various titles of the Texas Penal Code:

(I) offenses against the person (Title 5);

(II) offenses against property (Title 7);

(III) offenses against public order and decency (Title 9);

(IV) offenses against public health, safety, and morals (Title 10); and

(V) offenses of attempting or conspiring to commit any of the offenses in this subsection (Title 4);

(C) the extent to which any certificate or permit might offer an opportunity to engage in further criminal history activity of the same type as that in which the person previously has been involved; and

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibility of a respiratory care practitioner. In making this determination, the department will apply the criteria outlined in Texas Occupations Code, Chapter 53 the legal authority for the provisions of this section.

(3) The misdemeanors and felonies listed in paragraph (2)(B)(i) - (iii) of this subsection are not inclusive in that the department may consider other particular crimes in special cases in order to promote the intent of the Act and these sections.

(b) Procedures for revoking, suspending, suspending on an emergency basis, or denying a certificate or temporary permit to persons with criminal backgrounds.

(1) The department shall give written notice to the person that the department intends to deny, suspend, or revoke the certificate or temporary permit after hearing in accordance with the provisions of the Administrative Procedure Act, Chapter 2001, Texas Government Code, Texas Occupations Code, Chapter 53.

(2) If the department denies, suspends, suspends on an emergency basis, or revokes a certificate or temporary permit under these sections after hearing, the department shall give the person written notice:

(A) of the reasons for the decision;

(B) that the person, after exhausting administrative appeals, may file an action in a district court of Travis County, Texas for review of the evidence presented to the department and its decision;

(C) that the person must begin the judicial review by filing a petition with the court within 30 days after the department's action is final and appealable; and

(D) of the earliest date the person may appeal.

§140.214. Violations, Complaints, and Subsequent Actions.

(a) General. This section establishes standards relating to:

(1) offenses and prohibited actions under Texas Occupations Code, §604.102 which result in the penalty of a Class B misdemeanor;

(2) violations which result in disciplinary actions;

(3) procedures for filing complaints alleging violations and prohibited actions under the Act or rules; and

(4) the department's investigation of complaints and the department's and commissioner's actions, on behalf of the department, when offenses and prohibited actions and violations have occurred.

(b) Types of offenses and prohibited actions. A person is guilty of a Class B misdemeanor if:

(1) a person intentionally or knowingly represents oneself as able to practice respiratory care or represents oneself as a respiratory care practitioner unless the person holds a certificate or permit issued under the Act;

(2) a person who is not permitted or certified under the Act as a respiratory care practitioner or whose temporary permit or certificate has been suspended or revoked uses in connection with his or her practice the words "respiratory care," "respiratory therapist," "respiratory care practitioner," "certified respiratory care practitioner," "respiratory therapy technician," or the letters "RCP" or any other words, letters, abbreviations, or insignia indicating or implying that the person is a respiratory care practitioner. Such a person may not in any way, either orally, in writing, in print, or by sign, directly or by implication, represent himself or herself as a respiratory care practitioner;

(3) a person practices respiratory care other than under the direction of a qualified medical director or other physician licensed by the Texas Medical Board;

(4) a person sells, fraudulently obtains, or furnishes any respiratory care diploma, certificate, permit, or record;

(5) a person practices respiratory care under a respiratory care diploma, certificate, permit, or record illegally or fraudulently obtained or issued;

(6) a person practices respiratory care during the time that person's certificate or permit is suspended, revoked, or expired;

(7) a person conducts a formal respiratory care education program for the preparation of respiratory care personnel unless the program is approved by the department;

(8) a person employs another person who does not hold a certificate or permit to practice respiratory care in the capacity of a respiratory care practitioner;

(9) a person who holds a certificate or permit to practice respiratory care practices medicine, as defined by the Medical Practice Act, Texas Occupations Code, Chapter 157 without holding an appropriate license issued by the Texas Medical Board; or

(10) a person otherwise violates Texas Occupations Code, §§604.002, 604.102, 604.351, or 604.352.

(c) Filing of complaints.

(1) Anyone may complain to the department alleging that a person has committed an offense or action prohibited under the Act or that a certificate or permit holder has violated the Act or this chapter.

(2) A person wishing to complain about an offense, prohibited action, or alleged violation against a practitioner or other person shall notify the department. The initial notification of a complaint may be in writing, by telephone, or by personal visit to the department. The department's mailing address is 1100 West 49th Street, Austin, Texas 78756-3183, Phone: (512) 834-6632.

(3) Upon receipt of a complaint the department or the department's designee shall send an acknowledgment letter to the complainant and the department's complaint form which the complainant must complete and return to the department or the department's designee before action can be taken. If the complaint is made by a visit to the department, the form may be given to the complainant at that time; however, it must be completed and returned to the department or the department's designee before further action may be taken. Copies of the complaint form may be obtained from the department.

(4) Anonymous complaints shall be investigated by the department, provided sufficient information is submitted.

(d) Investigation of complaints. The department is responsible for investigating complaints.

(e) The department's action.

(1) The department shall take one or more actions described in this section.

(2) The department may determine that an allegation is groundless and dismiss the complaint.

(3) The department may determine that a practitioner has violated the Act or a department rule and may institute disciplinary action in accordance with subsection (f) of this section.

(4) Whenever the department dismisses a complaint or closes a complaint file, the department shall give a summary report of the final action to the advisory committee, the complainant, and the accused party.

(f) Disciplinary actions.

(1) The department may reprimand a practitioner or initiate action to deny, suspend, suspend on an emergency basis, probate, not renew, or revoke a certificate or a temporary permit. The department may also impose an administrative penalty in accordance with the Act, 604, Subchapter F.

(2) The department may take disciplinary action if it determines that a person who holds a certificate or temporary permit is in violation of §140.212 of this title (relating to Professional and Ethical Standards).

(3) The department may also take action under §140.213 of this title (relating to Certifying or Permitting Persons with Criminal Backgrounds to be Respiratory Care Practitioners).

(4) The department shall take into consideration the following factors in determining the appropriate action to be imposed in each case:

(A) the severity of the offense;

(B) the danger to the public;

(C) the number of repetitions of offenses;

(D) the length of time since the date of the violation;

(E) the number and type of previous disciplinary cases filed against the respiratory care practitioner (RCP);

(F) the length of time the RCP has performed respiratory care procedures;

(G) the actual damage, physical or otherwise, to the patient, if applicable;

(H) the deterrent effect of the penalty imposed;

(I) the effect of the penalty upon the livelihood of the RCP;

(J) any efforts for rehabilitation; and

(K) any other mitigating or aggravating circumstances.

(5) The department may take action for violation of the Act or this chapter, an order of the department previously entered in a disciplinary proceeding, or an order to comply with a subpoena issued by the department.

(g) Formal hearing.

(1) The formal hearing shall be conducted according to the Administrative Procedure Act (APA), Texas Government Code, Chapter 2001.

(2) Prior to institution of formal proceedings to revoke or suspend a permit or certificate, the department shall give written notice to the permit or certificate holder by certified mail, return receipt requested, of the facts or conduct alleged to warrant revocation or suspension, and the person shall be given the opportunity, as described in the notice, to show compliance with all requirements of the Act and this chapter.

(3) To initiate formal hearing procedures, the department shall give the practitioner written notice for the opportunity for hearing. The notice shall state the basis for the proposed action. Within 10 days after receipt of the notice, the practitioner must give written notice to the department that he or she either waives the hearing or wants the hearing. Receipt of the notice is deemed to occur on the 10th day after the notice is mailed unless another date of receipt is reflected on a United States Postal Service return receipt.

(A) If the practitioner fails to request a hearing, the practitioner is deemed to have waived the hearing. If the hearing has been waived, the department shall recommend to the commissioner that the proposed action be taken.

(B) If the practitioner requests a hearing within 10 days after receiving the notice of opportunity for hearing, APA, Texas Government Code Chapter 2001.

(h) Final action.

(1) If the department suspends a certificate or permit, the suspension remains in effect until the department determines that the

reasons for suspension no longer exist. The respiratory practitioner whose certificate or permit has been suspended is responsible for securing and providing to the department such evidence, as may be required by the department that the reasons for the suspension no longer exist. The department shall investigate prior to making a determination.

(2) During the time of suspension, the former certificate or permit holder shall return the certificate or permit and identification card(s) to the department.

(3) If a suspension overlaps a certificate renewal period, the former certificate holder shall comply with the normal renewal procedures in these sections; however, the department may not renew the certificate until the department determines that the reasons for suspension have been removed.

(4) A person whose application is denied or whose temporary permit or certificate is revoked or surrendered is ineligible for a temporary permit or certificate under this Act for one year from the date of the denial or revocation or surrender.

(5) Upon revocation or nonrenewal, the former certificate or permit holder shall return the certificate or permit and any identification card(s) to the department.

§140.215. Informal Disposition.

(a) Informal disposition of any complaint or contested case involving a temporary permit or certificate holder or an applicant for licensure may be made through an informal settlement conference held to determine whether an agreed settlement order may be approved.

(b) If the department determines that the public interest might be served by attempting to resolve a complaint or contested case by an agreed order in lieu of a formal hearing, the provisions of this section shall apply. A temporary permit or certificate holder, or applicant may request an informal settlement conference; however, the decision to hold a conference shall be made by the department.

(c) An informal conference shall be voluntary. It shall not be a prerequisite to a formal hearing.

(d) The department shall decide upon the time, date, and place of the settlement conference and provide written notice to the temporary permit or certificate holder or applicant of the same. Notice shall be provided no less than ten days prior to the date of the conference by certified mail, return receipt requested to the last known address of the temporary permit or certificate holder or applicant or by personal delivery. The ten days shall begin on the date of mailing or personal delivery. The temporary permit or certificate holder or applicant may waive the ten-day notice requirement.

(1) The notice shall inform the temporary permit or certificate holder or applicant of the following:

(A) the nature of the alleged violation;

(B) that the temporary permit or certificate holder or applicant may be represented by legal counsel;

(C) that the temporary permit or certificate holder or applicant may offer the testimony of witnesses and present other evidence as may be appropriate;

(D) that the temporary permit or certificate holder or applicant's attendance and participation is voluntary;

(E) that the complainant may be present; and

(F) that the settlement conference shall be canceled if the temporary permit or certificate holder or applicant notifies the program administrator that he or she or his or her legal counsel will not attend.

(2) A copy of this section concerning informal disposition shall be enclosed with the notice of the settlement conference.

(e) The notice of the settlement conference shall be sent by certified mail, return receipt requested, to the complainant at his or her last known address or personally delivered to the complainant. The complainant shall be informed that he or she may appear and testify or may submit a written statement for consideration at the settlement conference. The complainant shall be notified if the conference is canceled.

(f) The settlement conference shall be informal and shall not follow the procedures established in this chapter for contested cases and formal hearings.

(g) The temporary permit or certificate holder or applicant's attorney, and department staff may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(h) The program's legal counsel will be requested to attend each settlement conference. The department may call upon the program's attorney at any time for assistance in the settlement conference.

(i) The respondent shall be afforded the opportunity to make statements that are material and relevant.

(j) Access to the investigative file may be prohibited or limited in accordance with the Texas Government Code, Chapter 552.

(k) At the discretion of the department the settlement conference may be tape-recorded.

(l) The complainant shall not be considered a party in the settlement conference but shall be given the opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.

(m) At the conclusion of the settlement conference, the department may make recommendations for informal disposition of the complaint or contested case. The recommendations may include any disciplinary action authorized by the Act. They may also conclude that the department lacks jurisdiction, conclude that a violation of the Act or this chapter has not been established, or refer the matter for further investigation.

(n) The temporary permit or certificate holder or applicant may either accept or reject the settlement recommendations at the conference. If the recommendations are accepted, an agreed settlement order shall be prepared by the program staff and approved by the program's legal counsel and forwarded to the temporary permit or certificate holder or applicant. The order shall contain agreed findings of fact and conclusions of law. The temporary permit or certificate holder or applicant shall execute the order and return the signed order to the department office within ten days of his or her receipt of the order. If the temporary permit or certificate holder or applicant fails to return the signed order within the stated time period, the inaction shall constitute rejection of the settlement recommendations.

(o) If the temporary permit or certificate holder or applicant rejects the proposed settlement, the matter shall be referred to the department for appropriate action.

(p) If the temporary permit or certificate holder or applicant signs and accepts the recommendations, the agreed order shall be submitted to the department for its approval.

(q) The department shall enter an agreed order approving the accepted settlement recommendations. The department may not change the terms of a proposed order but may only approve or

disapprove an agreed order unless the temporary permit or certificate holder or applicant agrees to other terms proposed by the department.

(r) If the department does not approve a proposed agreed order, the temporary permit or certificate holder or applicant and the complainant shall be so informed.

(s) A temporary permit or certificate holder or applicant's opportunity for an informal conference under this section shall satisfy the requirement of the APA, §2001.054(c).

(1) If the department determines that an informal conference shall not be held, the department shall give written notice to the temporary permit or certificate holder or applicant of the facts or conduct alleged to warrant the intended disciplinary action and the temporary permit or certificate holder or applicant shall be given the opportunity to show, in writing and as described in the notice, compliance with all requirements of the Act and this chapter.

(2) The complainant shall be sent a copy of the written notice described in paragraph (1) of this subsection. The complainant shall be informed that he or she may also submit a written statement to the department.

§140.216. Suspension of License Relating to Child Support and Child Custody.

(a) On receipt of a final court or attorney general's order suspending a license due to failure to pay child support or for failure to comply with the terms of a court order providing for the possession of or access to a child, the department shall immediately determine if the Respiratory Care Practitioner Certification has issued a certificate to the person named in the order. If a license has been issued the department shall:

(1) record the suspension of the license in the departments records;

(2) report the suspension as appropriate; and

(3) demand surrender of the suspended license.

(b) The department shall implement the terms of a final court or attorney general's order suspending a license without additional review or hearing. The department will provide notice as appropriate to the licensee or to others concerned with the license.

(c) The department may not modify, remand, reverse, vacate, or stay a court or attorney general's order suspending a license issued under the Texas Family Code, Chapter 232, and may not review, vacate, or reconsider the terms of an order.

(d) A licensee who is the subject of a final court or attorney general's order suspending his or her license is not entitled to a refund for any fee paid to the department.

(e) If a suspension overlaps a license renewal period, an individual with a license suspended under this section shall comply with the standard renewal procedures in the Respiratory Care Practitioner Certification Act, Texas Occupations Code, §604.153, and §604.157, concerning the issuance of renewal certificates. However, the license will not be renewed until the requirements of subsections (g) and (h) of this section are met.

(f) An individual who continues to use the titles "respiratory care," "respiratory therapist," "respiratory care practitioner," "certified respiratory care practitioner," "respiratory therapy technician," or the letters "RCP" or any other words, letters, abbreviations, or insignia indicating or implying that the person is a respiratory care practitioner after the issuance of a court or attorney general's order suspending the license is liable for the same civil and criminal penalties provided for engaging in the prohibited activity without a license or while a license is suspended as any other license holder of the department.

(g) On receipt of a court or attorney general's order vacating or staying an order suspending a license, the department shall promptly issue the affected license to the individual if the individual is otherwise qualified for the license.

(h) The individual must pay a reinstatement fee as referred in §140.204 of this title (relating to Fees) prior to issuance of the license under subsection (g) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 22, 2007.

TRD-200703826
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER F. CONTACT LENS DISPENSERS

25 TAC §§140.250 - 140.264

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §§140.250 - 140.264, concerning contact lens dispensers.

BACKGROUND AND PURPOSE

The proposed new rules are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 Texas Administrative Code (TAC), Chapter 140, Health Professions Regulation. The new rules transfer and update existing language, and do not impose any new requirements or fees on applicants or permit holders.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 128.1 - 128.15 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the department is proposing to repeal the existing sections and adopt the rules in 25 TAC, Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

New §140.250 sets forth purpose and scope of the rules. New §140.251 includes definitions for terms used within the rules. New §140.252 lists the fees required for issuance of a permit, renewal, and issuance of a duplicate permit. New §140.253 references the relevant Health and Human Services Commission rules on submitting a petition for rulemaking. New §140.254 sets forth standards for the sale or delivery of contact lenses and prescription verification. New §140.255 sets forth requirements for the display of the permit. New §140.256 describes application procedures and lists qualifications for a permit. New §140.257

provides timelines for the processing of initial and renewal applications, and for refunds to be issued if the timelines are exceeded without sufficient cause. New §140.258 sets forth information concerning permit renewal and late renewal, including renewal procedures for a retired permit holder providing voluntary charity care and a permit holder on active military duty. New §140.259 covers procedures for changes of name or address, including the issuance of a duplicate permit. New §140.260 sets out procedures concerning complaints and investigations. New §140.261 lists violations and prohibited actions, and actions the department may take against a person when violations have occurred. New §140.262 describes the procedures for informal disposition of a complaint. New §140.263 describes the procedures for formal hearings. New §140.264 sets out the guidelines and criteria on the eligibility of persons with criminal backgrounds to obtain a permit.

FISCAL NOTE

Debbie Peterson, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five-year period that the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Peterson has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This determination was made because the new rules do not impose any new requirements. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Peterson has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the permitting and regulation of contact lens dispensers.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the pubic health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Yvonne Feinleib, Program Director, Contact Lens Dispensing Permit Program, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-4521 or by email to Yvonne.Feinleib@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed new rules are authorized by Occupations Code, §353.005, which authorizes the adoption of rules regarding contact lens dispensing permits; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed new rules affect the Occupations Code, Chapter 353; Government Code, Chapter 531; and Health and Safety Code, Chapter 1001.

§140.250. Introduction.

(a) This subchapter implements the applicable provisions of the Texas Contact Lens Prescription Act, Occupations Code, Chapter 353, concerning the issuance of a contact lens prescription, a patient's right of access to that prescription, and the regulation of persons filling contact lens prescriptions.

(b) These sections cover definitions; permit fees; petition for rulemaking; sale or delivery of contact lenses and prescription verification; display of permit; permit application requirements and procedures; application processing; renewal of permits; name and address changes; filing complaints and complaint investigations; grounds for disciplinary actions; informal dispositions; formal hearings; and guidelines for issuing permits to persons with criminal convictions.

§140.251. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Words and terms defined in the Texas Contact Lens Prescription Act shall have the same meaning in this subchapter as that assigned in the Act.

(1) Act--The Texas Contact Lens Prescription Act, Occupations Code, Chapter 353.

(2) Applicant--A person or entity who applies for a permit under the Act.

(3) Business entity--A business operating under any legal business structure other than a sole proprietorship.

(4) Commissioner--The Commissioner of the Department of State Health Services.

(5) Department--The Department of State Health Services.

(6) Executive Commissioner--The Executive Commissioner of the Health and Human Services Commission.

(7) Optician--A person, other than a physician, optometrist, therapeutic optometrist, or pharmacist, who is in the business of dispensing contact lenses.

(8) Permit--A contact lens dispensing permit issued under the Act to an optician, a corporation, or other business entity that fills a contact lens prescription in this state or sells, delivers, or dispenses contact lenses to any person in this state.

§140.252. Fees.

(a) The permit fees are as follows:

(1) $100 for a two-year term for an optician who has registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352;

(2) $150 for a two-year term for an optician who has not registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352;

(3) $50 for a two-year term for a retired optician providing voluntary charity care who has registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352;

(4) $75 for a two-year term for a retired optician who has not registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352; and

(5) $600 for a two-year term for a business entity.

(b) For all applications and renewal applications, the department is authorized to collect fees to fund the Office of Patient Protection, Health Professions Council, as mandated by law.

(c) For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§140.253. Petition for Rulemaking.

The Executive Commissioner's procedures for the submission, consideration, and disposition of a petition to adopt a rule are set out in 1 TAC §351.2 (relating to Petition for the Adoption of a Rule).

§140.254. Sale or Delivery of Contact Lenses and Prescription Verification.

(a) An individual or business holding a permit shall comply with the federal "Fairness to Contact Lens Consumers Act" Public Law 108 - 164, and applicable standards in Occupations Code, Chapter 353.

(1) A permit holder may not deliver or dispense contact lenses to a customer unless the permit holder:

(A) receives a valid prescription directly or by facsimile; or

(B) verifies a prescription in accordance with this subsection.

(2) A permit holder shall retain an electronic or paper record of each prescription or verification for a minimum of two years from the last date lenses were dispensed based on that prescription or verification. The record shall contain all information specified by federal and state laws and rules related to requirements for a prescription or verification, including any authorized modification showing the number of lenses dispensed. If the prescription is extended by the prescriber, a record of the extension or verification of the extension shall also be maintained.

(3) A permit holder may not sell, deliver, or dispense contact lenses in a flea market.

(b) A prescription is considered verified if it meets the standards for verification set out by federal law, the "Fairness to Contact Lens Consumers Act" (Public Law 108-164), federal rules, 16 CFR Part 315 (Contact Lens Rule) and state law, Occupations Code, §353.1015.

(c) A prescription may only be verified by direct communication, which means completed communication by telephone, facsimile, or electronic mail. A prescription is verified only if one of the following occurs:

(1) the prescriber confirms the prescription is accurate by direct communication with the permit holder;

(2) the prescriber informs the permit holder through direct communication that the prescription is inaccurate and provides the accurate prescription; or

(3) the prescriber fails to communicate with the permit holder within eight business hours after receiving from the permit holder the information described in subsection (d) of this section.

(d) It is the responsibility of the permit holder to provide the prescriber with all information required by federal and state law for the verification of a prescription, including:

(1) the patient's full name and address;

(2) the contact lens power, manufacturer, base curve or appropriate designation, and diameter when appropriate;

(3) the quantity of lenses ordered;

(4) the date of patient request;

(5) the date and time of verification request; and

(6) the name of a contact person at the permit holder's company, including facsimile and telephone numbers.

(e) If the permit holder opts to include the prescriber's regular business hours on Saturdays as "business hours" as specified by subsection (c)(3) of this section, a clear statement of the prescriber's regular Saturday business hours must be included with the verification request.

(f) If a permit holder attempts to verify a prescription, and a prescriber informs a permit holder before the deadline specified by subsection (c)(3) of this section that the contact lens prescription is inaccurate, expired, or otherwise invalid, the permit holder shall not fill the prescription. The prescriber shall specify the basis for the inaccuracy or invalidity of the prescription. If the prescription communicated by the permit holder to the prescriber is inaccurate, the prescriber shall correct it, and the prescription shall then be deemed verified.

(g) During the eight business hours specified by subsection (c)(3) of this section, the permit holder shall provide a reasonable opportunity for the prescriber to communicate with the permit holder concerning the verification request.

(h) The Executive Commissioner and the Executive Director of the Texas Optometry Board may enter into interagency agreements as necessary to implement and enforce this subchapter.

§140.255. Display of Permit.

(a) A permit holder shall prominently display the contact lens dispensing permit in his or her primary place of employment or business and shall make the department's address available upon request to any person who wishes to file a complaint.

(b) A business entity that holds one permit for multiple business locations shall display the permit in one of the locations and shall make the permit number and the department's address available upon request at any location to any person who wishes to file a complaint.

§140.256. Application Requirements and Procedures.

(a) Contact lenses may only be dispensed by the following persons: a physician, optometrist, or therapeutic optometrist; a pharmacist; or an optician, a corporation, or other business entity that holds a valid contact lens dispensing permit issued under the Act.

(b) An employee of a corporation or business entity with a permit issued under the Act is not required to obtain a separate permit.

(c) A corporation or other business entity that dispenses contact lenses to a person in this state must obtain a contact lens dispensing permit. A corporation or other business entity with ten or more locations may obtain a single permit for the entity and its employees.

(d) An applicant for a permit must submit all required information on official application forms prescribed by the department and submit the required permit fee.

(e) The application form shall contain the following information:

(1) specific information regarding personal data, full legal name, date of birth, social security number, information regarding other licenses, registrations, permits, and certifications held by applicant, and information regarding misdemeanor and felony convictions of applicant;

(2) trade names and addresses of all locations in which the optician intends to conduct business;

(3) if applicant is a corporation or other business entity, specific information regarding type of ownership, registered address, and names and addresses of all officers, directors, registered agents and major shareholders;

(4) a statement that the applicant has read the Act and these rules;

(5) a statement that the applicant, if issued a permit, shall return the permit to the department upon revocation or suspension of the permit or other disciplinary action against the permit holder;

(6) a statement that the applicant understands that fees and materials submitted in the permitting process are nonrefundable and nonreturnable;

(7) a statement that the applicant agrees to comply with all state and federal laws and regulations regarding the sale, delivery, or dispensing of contact lenses;

(8) a statement that the information contained in the application is truthful and complete; and

(9) the signature of the applicant.

(f) The department shall not issue a permit to an applicant who has had a contact lens dispensing permit revoked or denied for cause within the 24-month period preceding the application date.

§140.257. Application Processing.

The department shall comply with the following procedures in processing applications for permits and applications for permit renewal.

(1) The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. The contact lens dispensing permit may be sent in lieu of the notice of acceptance of a complete application. The time periods are as follows:

(A) letter of acceptance of application for a permit--30 working days;

(B) issuance of permit renewal after receipt of documentation of all renewal requirements--20 working days; and

(C) letter of denial of permit--30 working days.

(2) In the event an application is not processed in the time periods stated in paragraph (1) of this section, the applicant has the right to request reimbursement of all fees paid in that particular application process. Application for reimbursement shall be made to the department. If the department does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the request will be denied.

(3) Good cause for exceeding the time period is considered to exist if the number of applications for permits and permit renewal exceeds by 15% or more the number of applications processed in the same calendar quarter the preceding year; another public or private entity relied upon by the department in the application process caused the delay; or any other condition exists giving the department good cause for exceeding the time period.

(4) If a request for reimbursement under paragraph (2) of this section is denied by the department, the applicant may appeal to the commissioner for a timely resolution of any dispute arising from a violation of the time periods. The applicant shall give written notice to the commissioner at the address of the department that he or she requests full reimbursement of all fees paid because his or her application was not processed within the applicable time period. The department shall prepare a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time period. The department shall provide written notice of the commissioner's decision to the applicant. An appeal shall be decided in the applicant's favor if the applicable time period was exceeded and good cause was not established. If the appeal is decided in favor of the applicant, full reimbursement of all fees paid in that particular application process shall be made.

(5) Contested cases. The time periods for contested cases related to the denial of permits or permit renewals are not included within the time periods stated in paragraph (1) of this section. The time period for conducting a contested case hearing runs from the date the department receives a written request for a hearing and ends when the decision of the department is final and appealable. A hearing may be completed within one to four months, but may extend for a longer period of time depending on the particular circumstances of the hearing.

§140.258. Renewal of Permit.

(a) The purpose of this section is to set out the rules governing permit renewal.

(b) When issued, a permit is valid for two years, commencing on the date of issuance of the initial permit.

(c) A permit holder must renew the permit every two years. The renewal date of a permit shall be the last day of the month in which the permit was originally issued.

(d) At least 30 days prior to the expiration date of a permit, the department shall send a notice to the permit holder's address in the department's records and a permit renewal form. The renewal form shall give notice of the expiration date of the permit and the amount of the renewal fee required. The permit holder must complete and return the renewal form and fee to the department.

(e) The permit renewal form shall require the applicant to provide the preferred mailing address, primary employment address and telephone number, trade names and addresses of all locations in which the optician intends to conduct business, and the disclosure of misdemeanor or felony convictions.

(f) A permit holder has renewed the permit when the permit holder has mailed the fully completed renewal form and the required renewal fee to the department prior to the expiration date of the permit. The postmark date shall be considered the date of mailing.

(g) The department shall issue a renewed permit to a permit holder who has met all requirements for renewal.

(h) Each permit holder is responsible for renewing the permit before the expiration date and shall not be excused from paying additional fees or penalties. Failure to receive notification from the department prior to the expiration date of the permit shall not excuse failure to file for timely renewal.

(i) A permit holder whose permit has expired may not fill a contact lens prescription in this state or sell, deliver, or dispense contact lenses to any person in this state.

(j) A person whose permit has been expired for 90 days or less may renew the permit by paying to the department a renewal fee that is equal to one and one-half times the normally required permit fee.

(k) A person whose permit has been expired for more than 90 days but less than one year may renew the permit by paying to the department a renewal fee that is equal to two times the normally required permit fee.

(l) A person whose permit has been expired for one year or more may not renew the permit. The person may obtain a new permit by complying with requirements and procedures for an original permit.

(m) A retired individual permit holder who wishes to dispense contact lenses only in the provision of voluntary charity care may renew the permit every two years by submitting the renewal form and the retired contact lens dispenser renewal fee in accordance with the renewal procedures described in this section. Voluntary charity care means dispensing contact lenses at no cost to the consumer. A retired contact lens dispenser who renews under this subsection may not sell contact lenses or receive any remuneration for dispensing lenses.

(n) A permit holder whose check for the renewal fee is not honored by the financial institution shall remit to the department a money order or cashier's check within 30 days of the date of the permit holder's receipt of the department's notice. If proper payment is not received, the permit shall not be renewed. If a renewed permit has already been issued, it shall be ineffective.

(o) If a permit holder fails to timely renew his or her permit because the permit holder is or was on active duty with the armed forces of the United States of America serving outside the State of Texas, the permit holder may renew the permit pursuant to this subsection.

(1) Renewal of the permit may be requested by the permit holder, the permit holder's spouse, or an individual having power of attorney from the permit holder. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(2) Renewal may be requested before or after expiration of the permit. Permit holders who renew in accordance with this subsection shall be excused from paying late fees and penalties.

(3) A copy of the official orders or other official military documentation showing that the permit holder is or was on active duty serving outside the State of Texas shall be filed with the department along with the renewal form.

(4) A copy of the power of attorney from the permit holder shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this subsection.

(p) The department shall not renew a permit if renewal is prohibited by the Education Code, §57.491 (relating to Loan Default Ground for Non-renewal of Professional or Occupational License).

(q) The department shall not renew a permit if renewal is prohibited by a court order or attorney general's order issued pursuant to the Family Code, Chapter 232 (relating to Suspension of License), for failure to pay child support or failure to comply with a court order providing for the possession of or access to a child.

§140.259. Changes of Name or Address.

(a) The purpose of this section is to set out the responsibilities and procedures for name and address changes.

(b) The permit holder shall notify the department of changes in name or preferred mailing address within 30 days of such change(s).

(c) Notification of changes shall be made in writing and mailed to the department and shall include the former and present name, permit number, former and present mailing address, and a copy of the legal name change document, if applicable.

(d) Before a replacement permit will be issued by the department, the permit holder shall return any previously issued document(s).

(e) It is the responsibility of the permit holder to comply with the provisions of this section. Notice of complaints, violations, disciplinary action, or other correspondence sent to the address in the department's records are deemed received by the permit holder.

§140.260. Filing Complaints and Complaint Investigations.

(a) Complaints alleging that a person has violated the Act or this subchapter, may be filed with the department on a department complaint form or in writing by regular mail, facsimile, or electronic mail. The department may initiate a complaint based on a telephone call if there is a sufficient basis and documentation to proceed.

(b) Upon receipt of verified complaint, the department shall send the complainant an acknowledgment letter. The department shall, at least as frequently as quarterly, notify the complainant and the respondent of the status of the complaint until its final disposition.

(c) Anonymous complaints may be investigated by the department if there is a sufficient basis and documentation to proceed.

(d) The department shall investigate the complaint. If the department determines that the complaint is not within the department's jurisdiction, the complainant will be notified. If warranted, the complaint may be referred to another governmental agency for review.

(e) The department may determine that the permit be revoked, suspended, placed on probation or that other appropriate action as authorized by law be taken.

(f) If the department determines that there are insufficient grounds to support the complaint, the complaint shall be dismissed. Written notice of the dismissal will be provided to the permit holder or person against whom the complaint has been filed and the complainant.

§140.261. Grounds for Disciplinary Actions.

(a) The department may deny a permit renewal application, suspend or revoke a permit, or place a permit on probation for a violation of the Act or this subchapter. The department may also impose an administrative penalty of not more than $1,000 for a violation of the Act.

(b) Prior to institution of formal proceedings to deny a renewal application, revoke, suspend, or place on probation or impose an administrative penalty, the department shall give written notice to the permit holder by certified mail, return receipt requested, of the facts or

conduct alleged to warrant the proposed action, and the permit holder shall be given an opportunity, as described in the notice, to show compliance with all requirements of the Act and this subchapter.

(c) If disciplinary action of a permit holder is proposed, the department shall give written notice by certified mail, return receipt requested, that the permit holder must request, in writing, a formal hearing within 30 days of receipt of the notice, or the right to a hearing shall be waived and the action shall be taken.

(d) The department may request the Attorney General to bring an action for an injunction to prohibit a person from violating the Act or this subchapter.

(e) The department may not deny a permit renewal application or suspend, revoke, or probate a permit or impose administrative penalties against a permit holder based on the refusal of the permit holder to:

(1) submit to a genetic test; or

(2) reveal:

(A) whether the applicant or permit holder has submitted to a genetic test; or

(B) the results of any genetic test to which the applicant or permit holder has submitted.

(f) The department may impose an emergency suspension for a violation of the Act or this subchapter in accordance with the procedures established in Occupations Code, §353.2025.

§140.262. Informal Disposition.

(a) Informal disposition of any complaint or contested case involving a permit holder or an applicant for a contact lens dispensing permit may be made through an informal settlement conference held to determine whether an agreed settlement order may be secured.

(b) An informal settlement conference shall be voluntary.

(c) A settlement conference shall be informal and shall not follow the procedures established in this subchapter for contested cases and formal hearings.

(d) The permit holder, the permit holder's attorney, and department staff may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(e) The complainant shall not be considered a party in the settlement conference but shall be given an opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.

(f) At the conclusion of the settlement conference, department representatives may make recommendations for informal disposition of the complaint or contested case or for any disciplinary action authorized by the Act. The department may also:

(1) conclude that the department lacks jurisdiction;

(2) conclude that a violation of the Act or this subchapter has not been established;

(3) order that the investigation be closed; or

(4) refer the matter for further investigation.

§140.263. Formal Hearings.

(a) Formal hearings shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.

(b) Copies of the formal hearing procedures are indexed and filed in the Professional Licensing and Certification Unit, 8407 Wall Street, Austin, Texas 78754, and are available for public inspection during regular working hours.

§140.264. Guidelines For Issuing Permits to Persons with Criminal Convictions.

(a) The purpose of this section is to comply with the requirements of the Occupations Code, Chapter 53, Subchapter C (relating to Notice and Review of Suspension, Revocation, or Denial of License).

(b) The department may deny a permit application or a permit renewal application, or revoke, suspend, or place on probation an existing permit if an applicant or permit holder has been convicted of a crime (felony or misdemeanor) according to the following guidelines:

(1) those criminal convictions which evidence an unwillingness or inability to comply with the Act or this subchapter; and

(2) the factors and evidence listed in the Occupations Code, Chapter 53, Subchapter B (relating to Ineligibility for License) shall be considered in determining eligibility for a permit.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703828
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 421. HEALTH CARE INFORMATION

SUBCHAPTER A. COLLECTION AND RELEASE OF HOSPITAL DISCHARGE DATA

25 TAC §§421.1 - 421.10

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§421.1 - 421.10, concerning the collection and release of hospital discharge data.

BACKGROUND AND PURPOSE

Sections 421.1 - 421.10 establish the rules regarding the collection requirements and release specifications of hospital inpatient discharge data from Texas hospitals. The rules were originally developed and adopted by the Texas Health Care Information Council (council) and were transferred to the Department of State Health Services as result of the consolidation of health and human service agencies under House Bill 2292 (HB 2292), 78th Texas Legislature.

The amendments are necessary to comply with Health and Safety Code, Chapter 108, which requires the Executive Commissioner to adopt rules to implement the data submission requirements for hospitals required under Chapter 108 to submit inpatient discharge data to the department. The proposed amendments to the rules will require the submission of a new data element, not previously collected, that cannot be required to be submitted to the department before the 90th day after the

date the rule is adopted and must take effect not later than the first anniversary after the date the rule is adopted.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 421.1 - 421.10 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

In response to the consolidation of the council into the department, the terms "Council" or "Executive Director" are replaced with the term "department" throughout Subchapter A and the referenced section numbers are updated throughout the subchapter to reflect the numbers assigned when the rules were transferred to the department in 2004.

The amendments to §421.1 delete the terms "Council," "Executive Director," and "Scientific Review Panel" and add the terms "Institutional Review Board" and "department" to update the language in response to consolidation, and the terms are renumbered accordingly. The amendments to §§421.2 - 421.7 revise references to old rules and legacy council references.

Section 421.5 also deletes obsolete references to Council members.

Section 421.7 also deletes an incorrect reference to the law on civil penalties.

The Centers for Medicare and Medicaid Services (CMS) have specified that they are requiring a code indicating whether a diagnosis was present at the time a patient was admitted to the hospital, to check on the quality of care and to reduce payments to those facilities that fail to meet some level of quality of care for Medicare patients. This indicator code will be collected and used by the department for public reporting on the quality of care in the hospitals. The "Diagnosis Present on Admission" indicator code is critical for Patient Safety and Pediatric Quality reporting methodologies developed by the United States Department of Health and Human Services, Agency for Healthcare Quality and Research and used by the department for public reporting. The amendments to §421.8 add the data element "Diagnosis Present On Admission" as §421.8(c)(11)(IIII). This requires the department to include this new data element in the public use data file. The public use data file is an electronic file with patient level data that identifies facilities and provides consumers and researchers with data for making informed decisions regarding healthcare or for analysis of the level of care provided in those Texas hospitals required to submit data. The amendment to §421.8(l)(1) updates the name of the request form and replaces "executive director" with "department" and replaces where the form is to be submitted from the "Council's executive director" to the "department." The amendments to §421.8(l)(3) and (4) replace the Council's "Scientific Review Panel" with the department's "Institutional Review Board." Section 421.8 deletes references to an abolished committee and deletes §421.8(e)(3) and (4) as these paragraphs refer to data collected in 1998 and data released in 1999.

The amendment to §421.9 adds the data element "Diagnosis Present on Admission" to the list of data elements required to be submitted. The data element is added as §421.9(d)(48). This requires hospitals required to comply with Health and Safety Code, Chapter 108, to submit applicable diagnosis present on admission indicator codes for each secondary diagnosis.

The amendments to §421.10 replace the Council's "Scientific Review Panel" with the department's "Institutional Review Board" as the entity authorized to review and grant or deny release of hospital discharge research data to requestors as specified in Chapter 108.

Section 421.10(c), (d) and paragraphs (1), (2), (4), (5) and (6) in subsection (e) are deleted as they are no longer required for enforcement of the rules of this subchapter or Health and Safety Code, Chapter 108, as a result of the consolidation.

The amendment to §421.10(f)(2) replaces "executive director, in consultation with the Council" with "department" regarding who sets the fees for data files and deletes the requirement to consult with the Council, as a result of the consolidation.

The amendment to §421.10(f)(3) replaces the word "Executive Director" with "department" regarding the determination to waive or reduce fees charged for public use data files or the research data file.

Section 421.10(f)(5) is deleted, as a result of the consolidation.

The amendment to §421.10(g) replaces the term "Executive Director" with the term "department" regarding who shall receive the written report from the Chair of the Institutional Review Board/Scientific Review Panel.

FISCAL NOTE

Ramdas Menon, Ph.D., Director, Center for Health Statistics, has determined that for each calendar year of the first five years that the amended sections are in effect, there will be fiscal implications to the state as a result of enforcing or administering the sections as proposed. The effect on state government will be a one time cost for the department of $28,500 for development and modification to the current health care data collection system (data file format, file structures, logs, reports and three associated data software tools) and the University of Texas Medical Branch at Galveston stated a one time cost of $1500 for programming to submit the data as required by the proposed rule. The following four years there will be no additional costs to the department. The following state hospital systems responded to an inquiry on the cost to implement the proposed amendments that there would be no additional costs: Texas Center for Infectious Disease, Department of State Health Services Mental Hospitals, the University of Texas M.D. Anderson and the University of Texas Health Center at Tyler. The other state facilities provided no response. The fiscal implications of submitting the "Diagnosis Present on Admission" indicator codes as proposed for local governments that own or operate hospitals of systems will vary dependent on the complexity of the hospitals' information technology and contract requirements with any vendors involved.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Dr. Menon anticipates that those hospitals required to report under Health and Safety Code, Chapter 108, that submit data to CMS would not incur additional costs for the collection of the "Diagnosis Present on Admission" indicator, since this data element will be required for all providers that submit to CMS. Those hospitals that do not submit data to CMS will incur additional costs dependent on the complexity of their information technology system. Dr. Menon anticipates that all hospitals that are required to submit under Health and Safety Code, Chapter 108, will modify or have modified their computer systems to capture and submit the "Present on Admission" code for the associated secondary diagnosis codes. Hospitals that are small businesses

or micro-businesses that contract with a vendor or have built a computer system that is separate from their billing system will incur varying costs, depending upon the complexity of their systems and contract requirements with any vendors involved with the hospitals information technology systems on submitting the "Diagnosis Present on Admission" indicator codes as proposed. There are no other anticipated economic costs to persons who are required to comply with the sections as proposed. There will be no effect on local employment.

PUBLIC BENEFIT

Dr. Menon has also determined that for each year of the first five years the amendments are in effect, the public will benefit from the adoption of the amended sections. The public benefit anticipated as a result of collecting and reporting of this data element is the ability to provide the public with additional data regarding whether a diagnosis was present at the time the patient was admitted to the hospital or after the patient had been admitted to the hospital. The public will benefit from health care provider reports and information about the quality of care being provided in hospitals. The standardized data and the reports and information developed from the data will assist the consumer in making informed decisions on healthcare issues. The public will also benefit by having this subchapter of rules updated to reflect the current organization of the Department of State Health Services.

REGULATORY ANALYSIS

The department has determined that the proposed amendments are not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. The proposed amendments are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Bruce M. Burns, D.C., Center for Health Statistics, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7740 or by e-mail to Bruce.Burns@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services, General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendments are authorized by Health and Safety Code, §§108.006, 108.009, 108.010 and 108.011, which require the Executive Commissioner to adopt rules regarding which data elements are to be required for submission to the department and which data elements are to be released in a public use data file; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendments affect the Health and Safety Code, Chapter 108 and Government Code, Chapter 531. Review of the sections implements Government Code, §2001.039.

§421.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Accurate and Consistent data--Data that has been edited by the department [~~Council~~] and subjected to provider validation and certification.

(2) - (3) (No change.)

(4) Certification Process--The process by which a provider confirms the accuracy and completeness of the encounter data set required to produce the public use data file as specified in §421.7 [~~§1301.17~~] of this title (relating to Certification of Discharge Reports).

(5) - (6) (No change.)

[~~(7) Council--The Texas Health Care Information Council.~~]

(7) [~~(8)~~] Data format--The sequence or location of data elements in an electronic record according to prescribed specifications.

(8) Department--Department of State Health Services.

(9) (No change.)

(10) Discharge claim--A set of computer records as specified in §421.9 [~~§1301.19~~] of this title (relating to Discharge Reports--Records, Data Fields and Codes) relating to a specific patient. "Discharge claim" corresponds to the ANSI 837 Institutional Guide term, "Transaction set."

(11) Discharge report--A computer file as defined in §421.9 [~~§1301.19~~] of this title [~~(relating to Discharge Reports--Records, Data Fields and Codes)~~] periodically submitted on or on behalf of a Hospital in compliance with the provisions of this chapter. "Discharge report" corresponds to the ANSI 837 Institutional Guide terms, "Communication Envelope" or "Interchange Envelope."

(12) - (13) (No change.)

(14) Edit--An electronic standardized process developed and implemented by the department [~~Council~~] to identify potential errors and mistakes in data elements by reviewing data fields for the presence or absence of data and the accuracy and appropriateness of data.

(15) - (17) (No change.)

[~~(18) Executive director--The chief administrative officer of the Council, or, in the event the Council is without an executive director, the person designated by the chairperson of the Council to perform the functions and exercise the authority of the executive director.~~]

(18) [~~(19)~~] Facility Type Indicators--An indicator that provides information to the data user as to the type of facility or the primary health services delivered at that facility (e.g., Teaching, Acute Care, Rehabilitation, Psychiatric, Pediatric, Cancer, Skilled Nursing, Long Term Acute Care or other Long Term Care Facility). A facility

may have more than one indicator. Hospitals may request updates to this field.

(19) [~~(20)~~] Geographic identifiers--A set of codes indicating the public health region and county in which the patient resides.

(20) [~~(21)~~] HCPCS--HCFA's Common Procedure Coding System (HCFA - Health Care Finance Administrations (Now called Centers for Medicare and Medicaid Services)).

(21) [~~(22)~~] Health care facility--A hospital, an ambulatory surgery center licensed under Chapter 243 of the Health and Safety Code, a chemical dependency treatment facility licensed under Chapter 464 of the Health and Safety Code, a renal dialysis center, a birthing center, a rural health clinic or a federally qualified health center as defined by 42 United States Code, §1396(1)(2)(B).

(22) [~~(23)~~] HIPPS--Health Insurance Prospective Payment System.

(23) [~~(24)~~] Hospital--A public, for-profit, or nonprofit institution licensed or owned by this state that is a general or special hospital, private mental hospital, chronic disease hospital or other type of hospital.

(24) [~~(25)~~] ICD--International Classification of Disease.

(25) [~~(26)~~] Inpatient--A patient, including a newborn infant, who is formally admitted to the inpatient service of a hospital and who is subsequently discharged, regardless of status or disposition. Inpatients include patients admitted to medical/surgical, intensive care, nursery, subacute, skilled nursing, long-term, psychiatric, substance abuse, physical rehabilitation and all other types of hospital units.

(26) Institutional Review Board--The department's appointees or agent who have experience and expertise in ethics, patient confidentiality, and health care data who review and approve or disapprove requests for data or information other than the public use data as described in §421.10 of this title (relating to Institutional Review Board). The Institutional Review Board acts as the Scientific Review Panel described in the Health and Safety Code, §108.0135.

(27) Operating or Other Physician--The "physician" licensed by the Texas Medical Board [~~Texas State Board of Medical Examiners~~], or "other health professional" licensed by the State of Texas who performed the principal procedure or performed the surgical procedure most closely related to the principal diagnosis.

(28) - (29) (No change.)

(30) Patient account number--A number assigned to each patient by the hospital, which appears on each computer record in a patient discharge claim. This number is not consistent for a given patient from one hospital to the next, or from one admission to the next in the same hospital. The department [~~Council~~] deletes or encrypts this number to protect patient confidentiality prior to release of data.

(31) - (32) (No change.)

(33) Provider quality data--A report or reports authored by the department [~~Council~~] on provider quality or outcomes of care, as defined in Chapter 108 of Health and Safety Code, created from data collected by the department [~~Council~~] or obtained from other sources.

(34) - (35) (No change.)

(36) Required minimum data set--The list of data elements which hospitals are required to submit in a discharge claim for each inpatient stay in the hospital. The required minimum data set is specified in §421.9(d) [~~§1301.19(d)~~] of this title[~~. (relating to Discharge Reports--Records, Data Fields and Codes)~~]. This list does not include the data elements that are required by the ANSI 837 Institutional Guide to submit an acceptable discharge report. For example: Interchange Control Headers and Trailers, Functional Group Headers and Trailers, Transaction Set Headers and Trailers and Qualifying Codes (which identify which qualify subsequent data elements).

(37) Research data file--A customized data file, which includes the data elements in the public use file and may include data elements other than the required minimum data set submitted to the department [~~Council~~], except those data elements that could reasonably identify a patient or physician. The data elements may be [~~maybe~~] released to a requestor when the requirements specified in §421.8 [~~§1301.18(l)~~] of this title (relating to Hospital Discharge Data Release) are completed.

(38) - (39) (No change.)

~~[(40) Scientific Review Panel--The Council's appointees or agent who have experience and expertise in ethics, patient confidentiality, and health care data who review and approve or disapprove requests for data or information other than the public use data. Described in §1301.20 of this title (relating to Scientific Review Panel).]~~

(40) [~~(41)~~] Service Unit Indicator--An indicator derived from submitted data (based on Bill type or Revenue Codes) and represents the type of service unit or units (e.g., Coronary Care Unit, Detoxification Unit, Intensive Care Unit, Hospice Unit, Nursery, Obstetric Unit, Oncology Unit, Pediatric Unit, Psychiatric Unit, Rehabilitation Unit, Sub acute Care Unit or Skilled Nursing Unit) where the patient received treatment.

(41) [~~(42)~~] Severity adjustment--A method to stratify patient groups by degrees of illness and mortality.

(42) [~~(43)~~] Submission--The transfer of a set of computer records as specified in §421.9 [~~§1301.19~~] of this title [~~(relating to Discharge Reports--Records, Data Fields and Codes)~~] that constitutes the discharge report for one or more hospitals.

(43) [~~(44)~~] Submitter--The person or organization, which physically prepares discharge reports for one or more hospitals and submits them to the department [~~Council~~]. A submitter may be a hospital or an agent designated by a hospital or its owner.

(44) [~~(45)~~] THCIC Identification Number--A string of six characters assigned by the department [~~Council~~] to identify health care facilities for reporting and tracking purposes.

(45) [~~(46)~~] Uniform facility identifier--A unique number assigned by the department [~~Council~~] to each health care facility licensed in the state. For hospitals, this will include the hospital's state license number. For hospitals operating multiple facilities under one license number and duplicating services, the department [~~Council~~] will assign a distinguishable uniform facility identifier for each separate facility. The relationship between facility identifier and the name and license number of the facility is public information.

(46) [~~(47)~~] Uniform patient identifier--A unique identifier assigned by the department [~~Council~~] to an individual patient and composed of numeric, alpha, or alphanumeric characters, which remains constant across hospitals and inpatient admissions. The relationship of the identifier to the patient-specific data elements used to assign it is confidential.

(47) [~~(48)~~] Uniform physician identifier--A unique identifier assigned by the department [~~Council~~] to a physician or other health professional who is reported as attending or treating a hospital inpatient and which remains constant across hospitals. The relationship of the identifier to the physician-specific data elements used to assign it is confidential. The uniform physician identifier shall consist of alphanumeric characters.

(48) [~~(49)~~] Validation--The process by which a provider verifies the accuracy and completeness of data and corrects any errors identified before certification.

§421.2. Collection of Hospital Discharge Data.

(a) All hospitals in operation for all or any of the reporting periods described in §421.3 [~~§1301.13~~] of this title (relating to Schedule for Filing Discharge Reports) shall submit discharge claims as specified in §421.9 [~~§1301.19~~] of this title (relating to Discharge Reports--Records, Data Fields and Codes) on all discharged inpatients to the department [~~Council~~]. To the extent the admission, treatment, or discharge is made by a health professional, other than a physician, data elements specified in §421.9(d)(36) - (41) of this title [~~§1301.19(d)(36)-(41)~~] shall be filled accordingly or data elements (38) or (41) shall be marked with one of the department [~~Council~~] approved temporary "Physician" or "Other health professional" code numbers and data elements (36)(A) - (C) or (39)(A) - (C) [~~(36)(A-C) or (39)(A-C)~~] may be left blank. Hospitals owned by the federal government and hospitals exempted as rural providers may submit hospital discharge claim.

(b) All inpatient discharges shall be reported. Except as noted in paragraphs (1) - (4) of this subsection, one or more discharge claims shall be submitted for each patient for each discharge covering all services and charges from admission through discharge.

(1) - (2) (No change.)

(3) For all patients for which the hospital prepares one or more bills for inpatient services, the hospital shall submit a discharge claim corresponding to each bill containing the data elements required by §421.9 [~~§1301.19~~] of this title [~~(relating to Discharge Reports--Records, Data Fields and Codes)~~]. For all patients for which the hospital does not prepare a bill for inpatient services, the hospital shall submit a discharge claim containing the required minimum data set.

(4) For all patients that are covered by 42 USC 290dd-2 and 42 CFR Part 2.1, a hospital shall submit a discharge claim containing the required data elements specified by §421.9 [~~§1301.19~~] of this title [~~(relating to Discharge Reports--Records, Data Fields and Codes)~~]. The hospital shall replace the patient identifying information with the default values specified in §421.9(e) [~~§1301.19(e)~~] of this title [~~(relating to Discharge Reports--Records, Data Fields and Codes)~~] or submit the patient identifying information if release of patient identifying information is authorized in writing by the patient or patient's guardian.

(c) All hospitals shall file discharge reports by electronic filing unless the hospital receives an exemption letter from the department [~~Council~~].

(d) All hospitals shall submit discharge claims and discharge reports in the format specified in §421.9 [~~§1301.19~~] of this title [~~(relating to Discharge Reports--Records, Data Fields and Codes)~~].

(e) Hospitals shall submit discharge reports, data certifications, exemption requests and other required information to the department [~~Council~~] or its contractors [~~agents~~] at physical or telephonic addresses specified by the department [~~executive director~~]. The department [~~executive director~~] shall notify all hospitals and submitters in writing and by publication in the *Texas Register* at least 30 calendar days before any change in the addresses.

(f) Hospitals may submit discharge reports, or may designate an agent to submit the reports. If a hospital designates an agent, it shall inform the department [~~Council~~] of the designation in writing at least 30 calendar days prior to the agent's submission of any discharge report. The hospital shall inform the department [~~Council~~] in writing at least 30 calendar days prior to changing agents or making the submissions itself. Designation of an agent does not relieve the hospital of responsibility for compliance with this chapter or other related law.

(g) If requested by the department [~~Council~~], a hospital shall provide the department [~~executive director or the director's agent, the Texas Department of Health,~~] access to, copies of and/or information from the hospital documents and records underlying and documenting the discharge reports submitted, as well as other patient related documentation deemed necessary to audit hospital data to verify its accuracy and reliability. Each request from the department [~~Council~~] shall detail the reasons for such request, provide the hospital with at least 14 calendar days advance notice, and ensure that confidentiality of patient records is maintained.

§421.3. Schedule for Filing Discharge Reports.

(a) Hospitals [~~For discharges occurring on or after January 1, 1998, hospitals~~] shall file discharge reports according to the following schedule as shown in paragraphs (1) - (4) of this subsection unless a hospital has received an exemption letter from the department [~~Council~~].

(1) - (4) (No change.)

(b) Extensions to processing due dates may be granted by the department [~~executive director~~] for a maximum of ten working days in response to a written request signed by the hospital's chief executive officer. Requests must be in writing, must be received at least five working days prior to the due date and must be accompanied by adequate justification for the delay.

(c) (No change.)

§421.4. Instructions for Filing Discharge Reports.

(a) Magnetic Media. A discharge report may be filed on computer diskettes, nine track tapes or other magnetic media approved by the department [~~executive director~~]. All discharges shall be reported using the same file and record formats specified in §421.9 [~~§1301.19~~] of this title (relating to Discharge Reports--Records, Data Fields and Codes) regardless of medium.

(1) Media specifications are:

(A) - (B) (No change.)

(C) Other magnetic media: Discharge reports may be filed on other magnetic media only with the prior written approval of the department [~~executive director~~]. The department [~~executive director~~] will not normally approve any medium which the department [~~Council~~] is not currently equipped to read.

(2) - (3) (No change.)

(4) In addition to the provisions of this section, the department [~~Council~~] shall document instructions for filing discharge reports on magnetic media and shall make this documentation available to hospitals at no charge and to the public for the cost of reproduction. The department [~~Council~~] shall notify hospitals or their designated agents directly in writing at least 90 days in advance of any change in instructions for filing discharge reports on magnetic media. The department's [~~Council's~~] instructions shall follow Department of Information Resources standards for magnetic media established under 1 TAC Chapter 201.

(b) Electronic Data Interchange. Discharge reports may be filed by modem using electronic data interchange (EDI). All discharges shall be reported using the same file and record formats specified in §421.9 [~~§1301.19~~] of this title [~~(relating to Discharge Reports--Records, Data Fields and Codes)~~] regardless of the medium of transmission, unless the hospital has obtained an exemption authorized by §421.5 [~~§1301.15~~] of this title (relating to Exemptions from Filing Requirements). The department [~~Council~~] shall document instructions for filing discharge reports by EDI and shall make this documentation

available to hospitals at no charge and to the public for the cost of reproduction. The department [~~Council~~] shall notify hospitals and their designated agents directly in writing at least 90 days in advance of any change in instructions for filing discharge reports by EDI. The department's [~~Council's~~] instructions shall follow Department of Information Resources standards for EDI.

§421.5. Exemptions from Filing Requirements.

(a) Types of Exemptions.

(1) Exemption as a rural provider or other exempted provider. All hospitals except those owned by the federal government shall submit discharge reports to the department [~~Council~~] unless the department [~~Council~~] determines that the hospital is a rural provider or other exempted provider. The department [~~executive director~~] shall make a determination of which hospitals are entitled to this exemption at least annually and shall notify qualifying hospitals by publication in the *Texas Register* and by regular United States mail. Hospitals which are not initially given an exemption may apply for an exemption. This exemption, if granted, may be revoked by the department [~~Council~~] should the hospital cease to meet the criteria for exemption based upon the most current data issued by the United States Bureau of the Census or changes in hospital ownership or management relationships. Hospitals that cease to be exempted as rural providers or as other exempted providers shall be responsible for submitting discharge claims on all discharges that occur 30 days after loss of the exemption. The initial discharge report shall not be due until 90 days after notice is given. Subsequent discharge reports are due as specified in §421.3(a) [~~§1301.13(a)~~] of this title (relating to Schedule for Filing Discharge Reports).

(2) Exemptions from Quarterly Filing of Discharge Reports. Hospitals that wish to submit discharge reports to the department [~~Council~~] more often than quarterly may do so by requesting an exemption to the standard submission schedule. The department [~~Council~~] may also issue general exemptions based on the processing arrangements for data collection. Exemption requests meeting the following criteria as shown in subparagraphs (A) - (D) of this paragraph will normally be approved.

(A) - (B) (No change.)

(C) The exemption request will not result in data on any discharge being submitted to the department [~~Council~~] at a later date than it would have been if the standard schedule had been followed.

(D) The hospital agrees to adhere to the schedule specified in the exemption request until the hospital notifies the department [~~executive director~~] in writing that it wishes to end the exemption and report according to the standard schedule, or until a new exemption letter is issued.

(b) Requests for exemptions shall be submitted and processed using the following procedures as shown in paragraphs (1) - (4) of this subsection.

(1) A hospital requesting an exemption shall submit to the department [~~executive director~~] a letter requesting the exemption and providing all information necessary to establish the hospital's entitlement to the exemption. The exemption request shall be signed by the chief executive officer of the hospital who shall certify that all information contained in the request is true and correct.

(2) The department [~~executive director~~] shall review the request for exemption. The department [~~executive director~~] may request additional information from the hospital relevant to the exemption request. Within 30 days of receipt of a request, the department [~~executive director~~] shall issue a letter granting or denying the exemption. If denied, the letter shall state in detail the reasons for the denial. [~~The executive director shall notify Council members of exemptions requested and the disposition of these requests for information only.~~]

(3) If the department [~~executive director~~] denies an exemption request the hospital may:

(A) resubmit the request along with any additional information or analysis the hospital deems relevant to the department [~~executive director~~]. The resubmission shall be considered in the same manner as an initial submission; or

(B) appeal the department's [~~executive director's~~] decision to the commissioner of the department [~~Council~~]. The hospital may make an appeal directly to the commissioner of the department [~~Council~~]. In making its determination, the department [~~Council~~] will consider only those facts and issues which have been previously presented to the department [~~executive director. The Council will decide exemption appeals by majority vote of members present~~].

(4) The department [~~executive director~~] may revoke any type of exemption if facts indicate that a hospital no longer meets the criteria required for an exemption. The department [~~executive director~~] shall give the hospital written notice of the revocation at least 30 days prior to the effective date of the revocation. The notice shall include a detailed statement of the facts on which the revocation is based. A hospital may challenge the revocation of its exemption by:

(A) requesting the department [~~executive director~~] to reconsider the revocation by submitting any information or analysis the hospital deems relevant to the department [~~executive director~~] in writing at least ten days prior to the effective date of the revocation; and

(B) by appealing to the commissioner of the department [~~Council~~] if the department [~~executive director~~] does not grant the request for reconsideration. In making its determination, the commissioner of the department [~~Council~~] will consider only those facts and issues which have been previously presented to the department [~~executive director. The Council will decide exemption appeals by majority vote of members present~~].

(c) Reporting loss of exemptions. Hospitals shall notify the department [~~executive director~~] in writing within 30 days of their loss of an entitlement to an exemption authorized by subsection (a) of this section.

§421.6. Acceptance of Discharge Reports and Correction of Errors.

(a) To verify the accuracy of all discharge claims prior to public release, the department [~~executive director~~] shall establish procedures for the review of all discharge reports to determine whether the report is acceptable, as required by Health and Safety Code, §108.011.

(b) Upon receipt of a discharge report, the department [~~executive director~~] shall determine if it satisfies minimum criteria for processing. If it does not, the department [~~executive director~~] shall return the discharge report in the same submission format and media that is approved for that provider and state the deficiencies in writing within ten calendar days of receipt. The hospital shall resubmit the report within ten calendar days of notification by the department [~~executive director~~]. A discharge report does not meet minimum standards for processing under the following circumstances as shown in paragraphs (1) - (3) of this subsection.

(1) The physical media and labeling do not conform to the specifications in §421.4 [~~§1301.14~~] of this title (relating to Instructions for Filing Discharge Reports).

(2) (No change.)

(3) The file structure does not conform to the specifications in §421.9 [§1301.19] of this title (relating to Discharge Reports--Records, Data Fields and Codes), unless the hospital has received a letter from the department [Council] authorizing filing in another format.

(c) Correction of Errors.

(1) The department [executive director] shall review all discharge reports accepted for processing and will process all discharge claims against the editing criteria established by this section and by the department [executive director]. Within 10 calendar days of receipt of an accepted discharge report, the department [executive director] shall notify the hospital in detail of all errors detected in the discharge report.

(2) Within 30 calendar days of receiving initial notice of errors in a discharge report, the hospital shall correct all discharge claims containing errors, add any discharge claims determined to be missing from the initial discharge report and resubmit the corrected and/or previously missing discharge claims. If the hospital disagrees with any identified error, the hospital may indicate that the discharge claim is as accurate as it can be or cannot be corrected. Each hospital shall submit such modified and/or additional discharge claims as may be required to allow the chief executive officer or the chief executive officer's designated agent to certify the quarterly discharge report as required by §421.7 [§1301.17] of this title (relating to Certification of Discharge Reports). Corrections to a discharge report shall be submitted on approved media and formats as specified in §421.4 [§1301.14] of this title [(relating to Instructions for Filing Discharge Reports)] and §421.9 [§1301.19] of this title [(relating to Discharge Reports-Records, Data Fields and Codes)] unless the department [executive director] approves another medium or format.

(3) Within ten calendar days of receiving corrections to a discharge report from a hospital, the department [executive director] shall notify the hospital of any remaining errors. The hospital shall have ten calendar days from receipt of this notice to correct the errors noted or indicate why the data should be deemed acceptable and complete. This process may be repeated until the data is substantially accurate and the hospital is able to certify the discharge report as required by §421.7 [§1301.17] of this title [(relating to Certification of Discharge Reports)] or the deadline for submitting corrections prior to certification is reached. Corrected data is required to be submitted on or before the following dates for the respective quarter's discharges; Quarter 1 - August 1, Quarter 2 - November 1, Quarter 3 - February 1, Quarter 4 - May 1. No individual hospitals will be granted extensions to the dates. The department [executive director] may grant an extension to all hospitals when deemed necessary.

(4) Discharge claims that have not been previously submitted shall be submitted prior to the deadline for the following quarter's data. Correction and certification of these previously missing or additional discharge claims for the prior calendar quarter shall be made according to the deadlines established for following quarter in which the data that is scheduled to be processed as specified in §421.3(a)(1) [§1301.13(a)(1)] of this title (relating to the Schedule for Filing Discharge Reports), paragraph (3) of this subsection (relating to the Acceptance of Discharge Reports and Correction of Errors) and §421.7(b) and (d) [§1301.17(b) and (d)] of this title [(relating to the Certification of Discharge Encounter Data)]. Corrections to discharge claims previously submitted or that have a discharge date prior to calendar quarter immediately before the calendar quarter being processed scheduled will not be processed.

(d) The department [executive director] will document and the department [Council] will approve all acceptance and editing criteria utilized in reviewing discharge reports. If acceptance and editing criteria are incorporated into computer software, and if the software is the property of the department [Council], the department [executive director] will make copies of the portions of the software containing the criteria available on paper or magnetic media. The department [executive director] shall make this information available to submitters without charge and to others for the cost of reproduction.

(e) Failure to correct or comment on a discharge report which has been filed but contains errors or omissions, known to the hospital, within the due dates in §421.3 [§1301.13] of this title [(relating to Schedule for Filing Discharge Reports)] is punishable by a civil penalty pursuant to Health and Safety Code, §108.014.

§421.7. Certification of Discharge Reports.

(a) Within five months after the end of each reporting quarter, the department [executive director] shall compile one or more electronic data files for each reporting hospital using all discharge claims received from each hospital. The file shall have one record for each patient discharged during the reporting quarter and one record for any patient discharged during one prior reporting quarter for whom additional discharge claims have been received. This file will include all data submitted by the hospital, which the department [executive director] intends to use in the creation of the public use data file. The data files, including reports and any additional information returned to the hospital, allows the hospital to provide physicians and other health professionals the opportunity to review, request correction of, and comment on records of discharged patients for whom they are shown as "attending" or "operating or other". The department [executive director] shall determine the format and medium in which the quarterly file will be delivered to hospitals.

(b) The chief executive officer or chief executive officer's designated agent of each hospital shall indicate whether the hospital is certifying or not certifying the discharge encounter data specified in subsection (a) of this section, sign and return the form corresponding to the discharge report for each quarter using forms supplied by the department [Council]. The certification form may be signed by a person designated by the chief executive officer and acting as the officer's agent. Designation of an agent does not relieve the chief executive officer of personal responsibility for the certification. If the chief executive officer or chief executive officer's designated agent does not believe the quarterly file is accurate, the officer shall provide the department [executive director] with detailed comments regarding the errors or submit a written request (on a form supplied by the department [Council]) and provide the data necessary to correct any inaccuracy and certify the file subject to those corrections being made prior to the deadlines specified in this subsection. Corrections to certification discharge data shall be submitted on or prior to the following schedule: Quarter 1 - October 15; Quarter 2 - January 15; Quarter 3 - April 15; Quarter 4 - July 15. Chief Executive Officers or designees that elect not to certify shall submit a reasoned justification explaining their decision to not certify their discharge encounter data and attach the justification to the certification form. Election to not certify data does not prevent data from appearing in the public use data file. Data that is not corrected and submitted by the deadline may appear in the public use data file.

(c) The signed certification form shall represent that:

(1) - (3) (No change.)

(4) the hospital has provided physicians and other health professionals a reasonable opportunity to review and comment on the discharge data of patients for which they were reported in one of the available physician number and name fields provided on the acceptable formats specified in §421.9 [§1301.19] of this title (relating to Discharge Reports--Records, Data Fields and Codes) (for example, "attending physician" or "operating or other physician" as applicable).

The physicians or other health professionals may write comments and have errors brought to the attention of the chief executive officer or the chief executive officer's designated agent and the chief executive officer or the chief executive officer's designated agent, shall address any comments by the physicians or other health professionals.

(5) (No change.)

(d) Each hospital shall submit its certification form for each quarter's data to the department [~~Council~~] by the first day of the ninth month (Quarter 1 - December 1; Quarter 2 - March 1; Quarter 3 - June 1; Quarter 4 - September 1) following the last day of the reporting quarter as specified in §421.3(a)(1) - (4) [~~§1301.13 (a) (1) (4)~~] of this title (relating to Schedule for Filing Discharge Reports). Individual hospital requests for an extension to these deadlines will not be granted. The department [~~executive director~~] may extend the deadline for all hospitals when deemed necessary.

(e) Hospitals, physicians or other health professionals may submit concise written comments regarding any data submitted by them or relating to services, they have delivered which may be released as public use data. Comments shall be submitted to the department [~~Council~~] on or before the dates specified in subsection (d) of this section, regarding the submission of the certification form. Commenters are responsible for assuring that the comments contain no patient or physician identifying information. Comments shall be submitted electronically using the method described in §421.4(a) and (b) [~~§1301.14(a) and (b)~~] of this title (relating to Instructions for Filing Discharge Reports).

~~[(f) Failure to submit a signed certification form that is supplied by the Council on or before the dates specified in subsection (d) of this section corresponding to discharge data previously submitted is punishable by a civil penalty pursuant to Health and Safety Code, §108.014.]~~

(f) [~~(g)~~] Failure to either correct a discharge report which has been submitted and contains errors or omissions known to the hospital on or prior to the dates specified in subsection (b) of this section or to address in the comments the errors known to the hospital contained in the data and return the comments on or prior to the dates specified in subsection (d) of this section is punishable by a civil penalty pursuant to Health and Safety Code, §108.014(b).

§421.8. Hospital Discharge Data Release.

(a) Department [~~Council~~] records are public records under Government Code, Chapter 552, except as specifically exempted by Health and Safety Code, §108.010 and §108.013. Copies of such records may be obtained upon request and upon payment of user fees established by the department [~~Council~~]. The public use data file shall be available for public inspection during normal business hours. Discharge claims in the original format as submitted to the department [~~Council~~] are not available to the public, are not stored at the department's [~~Council's~~] office and are exempt from disclosure pursuant to Health and Safety Code, §108.010 and §108.013, and shall not be released. Likewise, patient and physician identifying data collected by the department [~~Council~~] through editing of hospital data shall not be released.

(b) Creation of codes and identifiers. The department [~~executive director~~] shall develop the following codes and identifiers, as listed in paragraphs (1) - (2) of this subsection, required for creation of the public use data file and for other purposes.

(1) - (2) (No change.)

(c) Creation of public use data file. The department [~~executive director~~] will create a public use data file by creating a single record for each inpatient discharge and adding, modifying or deleting data elements in the following manner as listed in paragraphs (1) - (11) of this subsection:

(1) - (6) (No change.)

(7) the minimum cell size required by §108.011(i)(2) of the Health and Safety Code shall be five, unless the department [~~executive director~~] determines that a higher cell size is required to protect the confidentiality of an individual patient or physician[~~. When determining a higher cell size, the executive director shall consider comments submitted by a hospital and recommendations submitted by the technical advisory committee as identified in the Texas Health and Safety Code §108.003(g)(5)~~];

(8) (No change.)

(9) add risk and severity adjustment scores utilizing an algorithm approved by the department [~~Council~~];

(10) (No change.)

(11) data elements to be included in the public use data file:

(A) - (HHHH) (No change.)

(IIII) Diagnosis Present On Admission.

(d) Release of public use data files. The department [~~Council~~] shall release in an aggregate form, without uniform patient, physician or other health professional identifiers, public use data relating to hospitals described by the Health and Safety Code, §108.0025(1) that are not rural providers because they do not meet the requirements of §108.0025(2).

(e) The department [~~executive director~~] will make available a public use data file on electronic, magnetic or optical media for each quarter:

(1) The department [~~executive director~~] shall release public use data from hospitals that have certified the data as required by §421.7 [~~§1301.17~~] of this title (relating to Certification of Discharge Reports). A hospital's failure to execute the certification form by the dates specified in §421.7(d) [~~§1301.17(d)~~] of this title, or elects to not certify the discharge encounter data shall not prevent the department [~~executive director~~] from releasing the hospital's data if the department [~~director~~] believes the data submitted is reasonably accurate and complete. The department [~~executive director, with the recommendation of the Hospital Discharge Data Committee,~~] may suppress for any quarter's data one or more data elements if deemed necessary to comply with provisions of the statutes. If an element is ordered suppressed by a judicial authority, the department [~~executive director~~] may suppress the element [~~without the recommendation of the Hospital Discharge Data Committee~~].

(2) If additional discharge claims (not previously submitted as specified in §421.6(c)(4) [~~§1301.16(c)(4)~~] of this title (relating to Acceptance of Discharge Reports and Correction of Errors), excluding replacement, adjustments and void/cancel discharge claims become available after the initial release of the public use data file for any quarter, the department [~~executive director~~] will add the discharge claims, that are received on or prior to the date specified in §421.3(a)(1) [~~§1301.13(a)(1)~~] of this title (relating to Schedule for Filing Discharge Reports) of the following quarter, to the public use data file and make the additional records available to the public.

~~[(3) The other sections of these rules notwithstanding, the executive director shall not create a public use data file from the discharge reports covering discharges occurring in 1998. It is the intent of the Council to utilize this data only for testing and calibration of its data processing systems and to allow hospitals the opportunity to test and calibrate their own data reporting systems.]~~

[(4) The first public use data file available for release will cover discharges for the first and second quarter of 1999. The Council will initially release six months of data in order to provide a more reliable body of data for analysis and decision-making and to make available public use data files on a quarterly schedule thereafter.]

(f) (No change.)

(g) The department [executive director] shall establish procedures for screening all requests to assure that filling the request will not violate the provisions of Health and Safety Code, §108.013(c).

(h) The data elements specified for discharge reports in §421.9 [§1301.19] of this title (relating to Discharge Reports--Records, Data Fields and Codes) do not constitute "Provider Quality Data" as discussed in Health and Safety Code, §108.010.

(i) A public use data file which is specified by the requestor shall not be considered a "report issued by the department [Council]" as referenced in Health and Safety Code, §108.011(f).

(j) Requests for data files including data on one or more providers are matters of public record and copies of all requests shall be maintained by the department [Council] for two years from the date of receipt. The department [executive director] shall make available on the department's [Council's] Internet site and publish in the department's [Council's] numbered letter for hospitals a summary of all requests received for public use data.

(k) With any public use data file prepared by the department [Council], the department [executive director] shall attach all comments submitted by providers, which relate to any data included in the file. The department [Council] shall also make these comments available at the department's [Council's] offices and on the department's [Council's] Internet site.

(l) A research data file may be released provided the following criteria are met:

(1) the department's Hospital Discharge Data [Texas Health Care Information Council] Research Data File Request Form is completed and submitted to the department [Council's executive director]; and

(2) the requestor has made payment according to the department's [Council's] fee schedule. The department's [Council's] fee includes a non-refundable "Review of Request Fee"; and

(3) the Institutional Review Board [Scientific Review Panel] reviews the research request and has determined the proposed research outcome can be achieved with the requested data; and

(4) the Institutional Review Board [Council's Scientific Review Panel] grants authorization to the request or restricts access to specified data elements determined to be inappropriate for the research proposal in accordance with §421.10 [this subsection] of this title (relating to Institutional Review Board [Scientific Review Panel]); and

(5) - (6) (No change.)

§421.9. Discharge Reports--Records, Data Fields and Codes.

(a) Hospitals that have not obtained an exemption letter authorized by §421.5 [§1301.15] of this title (relating to Exemptions from Filing Requirements) shall submit discharge reports, electronically in the file format for inpatient hospital bills defined by the American National Standards Institute (ANSI), commonly known as the ANSI ASC X12N form 837 Health Care Claims (ANSI 837 Institutional Guide) transaction for institutional claims and/or encounters. ANSI updates this format from time to time by issuing new versions.

(b) The department [Council] will make detailed specifications for these data elements available to submitters and to the public.

(c) In addition to the data elements contained in the ANSI 837 Institutional Guide, the department [Council] has defined the following data elements shown in this subsection and as defined the location in the ANSI 837 Institutional Guide where each element is to be reported. Data element content, format and locations may change as federal and state legislative requirements change in regards to Public Law 104-191, Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended, is implemented.

(1) - (4) (No change.)

(d) Hospitals shall submit the required minimum data set for all patients for which a discharge claim is required by this title. The required minimum data set includes the following data elements as listed in this subsection:

(1) - (47) (No change.)

(48) Diagnosis Present On Admission.

(e) (No change.)

§421.10. Institutional Review Board [Scientific Review Panel].

(a) The department shall use [Council establishes] the Institutional Review Board [Scientific Review Panel (Panel)] for the purposes of:

(1) evaluating applications for various measures or variables that are found in the department's [Council's] hospital discharge data "research" file; and

(2) (No change.)

(b) The Institutional Review Board functions relating to §421.8(l) of this title (relating to Hospital Discharge Data Release) and this section are [Scientific Review Panel is] abolished at such time as the department [Council] ceases to maintain a hospital discharge data "research" file.

[(c) The Council may establish the scientific review function through a contract with an existing institutional review board that meets federal guidelines or by appointing a separate review panel.]

[(d) Membership if scientific review panel is appointed.]

[(1) A person interested in membership on the Scientific Review Panel must submit an application, on a form specified by the Council, to the Executive Director of the Council.]

[(2) The Scientific Review Panel will consist of at least five members.]

[(3) The Council's Appointments Committee shall review all applications for membership and make recommendations to the Council. When making its recommendations, the Appointments Committee shall consider the qualification criteria in the Health and Safety Code, §108.0135 for each member and the restrictions on composition of committees in Government Code §2110.002.]

[(4) The Council, at its, discretion, shall appoint persons to the Scientific Review Panel. Members shall have experience and expertise in ethics, patient confidentiality, and health care data.]

[(5) Members shall be appointed for three-year terms, except that for the initial appointees, the terms of one-third of the members shall be for three years, another one-third for two years, and the remaining members for one year. The Appointments Committee shall assign the initial term of each member or position so as to provide for a staggered system of terms.]

[(6) The Council may remove a member from the Scientific Review Panel if he or she is absent from three consecutive meetings. The Chair of the Scientific Review Panel may recommend the removal of a member for non-attendance to the Council's appointments committee, which shall review the matter and make a recommendation to the Council.]

[(7) If a vacancy on the Scientific Review Panel occurs, the Council shall appoint an individual to serve the unexpired portion of that term.]

[(8) The Chair of the Scientific Review Panel is designated by the Chair of the Council from current members of the Panel. This person shall serve in that capacity at the pleasure of the Council Chair.]

(c) [(e)] Meetings.

[(1) The Scientific Review Panel shall meet as necessary to conduct business, but in any case, at least once every three months if applications for all or part of the research file are pending.]

[(2) A simple majority of the members of the Scientific Review Panel shall constitute a quorum for the purpose of transacting business. All action of the Panel must be approved by majority vote. Each member shall have one vote and may not vote by proxy or in absentia.]

[(3)] Meetings of the Institutional Review Board [Panel or Subcommittees of the Panel] shall be posted and conducted in accordance with the Texas Open Meetings [Meets] Act, Government Code, Chapter 551. All meetings of the Institutional Review Board[Panel or any Subcommittee] will be recorded.

[(4) Minutes of all Panel and Subcommittee meetings shall be maintained by Council staff and shall include the names of members in attendance and a record of all formal actions and votes taken.]

[(5) Council staff shall provide administrative support for the Panel and any Subcommittees, including making of meeting arrangements. Each Panel or Subcommittee member shall be informed of a meeting at least ten calendar days prior to a meeting.]

[(6) The Panel and Subcommittees shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.]

(d) [(f)] Decision-Making Guidelines.

(1) Requests should reasonably identify and justify the requested data elements. Requesters who have detailed information that would assist in justifying the records request are urged to provide such information in order to expedite the handling of the request. Envelopes in which written requests are submitted should be clearly identified as Open Records requests. Requests should include the fee or request determination of the fee.

(2) Fee structures for the public use data file and the research file shall be set by the department [executive director, in consultation with the Council].

(3) Waiver or reduction of the fees charged for the public use data file or the research file may be made upon a determination by the department [Executive Director] when such waiver or reduction is in the department's [Council's] interest.

(4) All requests for data must be submitted in writing, either on the form provided by the department [Council] or on a similar form containing all of the same information. Denials of written requests will be in writing and will contain the reasons for the denial including, as appropriate, a statement that a document or data element requested is nonexistent or is not reasonably described, or is subject to one or more clearly described exemption(s). [Denials will also provide the requester with appropriate information on how to exercise the right of appeal to the Council.]

[(5) In cases where there is an alleged conflict between the Texas Open Records Act and the Council's procedures, the Executive Director will refer the issue to the Office of the Attorney General.]

(5) [(6)] Only data elements requested by the requestor and approved for release by the Institutional Review Board [Scientific Review Panel], shall be included in the research file for release to the requestor in accordance with this chapter.

(e) [(g)] Reports to the department [Council]. The Chair of the Institutional Review Board [Scientific Review Panel] shall file with the Program Director [Executive Director of the Council] a written report of all action taken relating to requests under this section at any meeting of the Institutional Review Board [Panel] or of a Subcommittee within 3 working days of such meeting, including a detailed list of how each participating member voted.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703796
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 19. AGENTS' LICENSING

The Texas Department of Insurance (Department) proposes amendments to §§19.801, 19.802, and 19.1002, concerning the licensing, registration, examination, and appointment fees, and continuing education requirements for the newly created personal lines property and casualty agent license and the life agent license. The Department proposes these amendments to implement S.B. 1263, 80th Legislature, Regular Session, effective September 1, 2007, which established the personal lines property and casualty agent license and the life agent license to increase uniformity in insurance agent licensing criteria among the various states. The Department is proposing the repeal of existing §19.803, which is to be published in a future issue of the *Texas Register*. Although both proposals concern Chapter 19, Subchapter I of this title (relating to Licensing Fees), this proposal will not be affected by the proposed repeal.

The proposed amendments to §19.801 and §19.802 are necessary to maintain effective regulation of insurance licensees by establishing fees sufficient to cover Department administration costs, which include licensure and enforcement of disciplinary requirements, among other regulatory protections. The proposed amendment to §19.1002 is necessary to incorporate the new license types created by S.B. 1263 into the Department's

existing fee rule and continuing education rules. The proposed amendments are also necessary to update the Insurance Code references throughout the sections in accordance with the nonsubstantive revisions of the Insurance Code enacted by the 77th Legislature, effective June 1, 2003, and 79th Legislature, effective September 1, 2005.

Proposed amendments to §19.801(c) clarify the use of the subagent appointment in relation to the general agent and the newly created personal lines property and casualty agent and life agent license types and also consolidate in this section existing provisions from §19.802(d) relating to appointment of subagents by general lines agents. Prior to the enactment of S.B. 1263, only general agents could appoint another general agent as a subagent under §4001.205 of the Insurance Code. Senate Bill 1263 extends this authority by authorizing general agents, personal lines property and casualty agents, and life agents to appoint other general agents, personal lines property and casualty agents, and life agents as subagents.

Insurance agents are prohibited under the Insurance Code from writing a line of business for which the agent is not licensed by the Department. As to subagents, this prohibition is further reflected in Insurance Code, §4001.109, that, while not requiring the subagent to hold each license of the appointing agent, requires the subagent to be licensed to write each line that the subagent is employed to write. Thus, an appointing agent may only write a line of business that the appointing agent is licensed to write; and a subagent may only write a line of business that both the subagent and appointing agent are licensed to write.

For example, a general agent appointed as a subagent by a personal lines property and casualty or life agent is limited to personal lines property and casualty or life agent products through that appointment. To write products in addition to personal lines or life products, that general agent would be required to have a direct appointment from the insurance company issuing the additional products. Conversely, a personal lines property and casualty agent or life agent appointed by a general agent is limited to those lines authorized under their personal lines property and casualty or life agent licenses.

Therefore, the proposed amendment to §19.801(c)(1) adds the personal lines property and casualty agent and life agent license types to the existing language for consistency with the amended statute that these license types may appoint subagents. Section 19.801(c) is proposed to be amended by adding a new paragraph (2)(A) - (D) to address the subagent appointment process. Proposed new subparagraphs (2)(A) and (B) of §19.801(c) specify that only general lines agents, personal lines property and casualty agents, or life agents may appoint subagents and that only general lines agents, personal lines property and casualty agents, or life agents may be appointed as subagents. Proposed new §19.801(c)(2)(A) and (B) also consolidate a similar provision related to general lines subagent appointments in existing §19.802(d) for the purpose of making this subsection more complete concerning the subagent appointment process. Proposed new §19.801(c)(2)(C) provides clarification within the rule of the subagent's authority by restating Insurance Code, §4001.109. Proposed new §19.801(c)(2)(D) consolidates a similar provision from existing §19.802(d) for the purpose of making this subsection complete concerning the subagent appointment process. Proposed amendments to subsections (e) and (f) of §19.801 add introductory titles to make the style consistent with subsections (a) - (d) of that section.

Proposed amendments to §19.802(b) add new paragraphs (22) and (23) to include personal lines property and casualty agents and life agent license types created by S.B. 1263 and propose application, renewal, appointment, and Department administered examination fees for these license types. Under existing law, including Insurance Code, §4001.006, the Department is required to set fees in amounts that are reasonable and necessary to implement and enforce Insurance Code, Title 13. Senate Bill 1263 establishes the personal lines property and casualty license and the life agent license types in Insurance Code, Title 13, Subtitle B. The Department anticipates no cost difference in administering the two new license types when compared to other agent license types. Therefore, the Department is proposing the same fees for these license types as other agent license types because these previously adopted fees have already been determined to comply with the statutory requirements of reasonable and necessary.

Individuals holding either a personal lines property and casualty agent license or life agent license are subject to the Department's continuing education program both specifically under Insurance Code, §4004.053(a), as amended by S.B. 1263, and existing §4004.051, since these licenses are regulated under Subchapter B, Title 13, Insurance Code. The proposed amendment to §19.1002(b)(16) revises the definition of Licensee by adding the personal lines property and casualty agent and life agent license types. Under the amended definition, personal lines property and casualty agents and life agents will be required to meet the same statutory continuing education requirements as other licensees under the Insurance Code, Chapter 4004, and §§19.1001 - 19.1021. These requirements include completing 15 hours of continuing education annually as required by §4004.053, as amended; completing at least 50 percent of course work in classroom or classroom equivalent environments as required under §4004.051(c); and completing at least two hours of ethics training per each two-year license renewal period as required by §4004.054. Under the proposed amendment to §19.1002(b)(16), for purposes of continuing education requirements, both resident and nonresident individuals holding the new license types would be treated consistently with individuals holding existing license types.

In addition, but unrelated to the new licenses, the proposed amendments to §§19.801, 19.802, and 19.1002 make nonsubstantive revisions to references to certain agent license titles for consistency with the statute, including change of general lines property and casualty agent to general property and casualty agent; general lines life, accident, and health agent to general life accident and health agent; and, for the purpose of referring to both collectively, general lines agent to general agent.

Matt Ray, Deputy Commissioner, Licensing Division, has determined that, for the first five years the proposed amendments to §19.801 and §19.802 will be in effect, there will be an estimated increase in revenue to state government in the approximate amount of $637,750 annually for the first and second years and $647,000 in the third through fifth years as a result of the enforcement and administration of these amendments. This estimated increase is due to the initial licensing and biennial license renewal of personal lines property and casualty agents and life agents. Based on information from other states with similar licenses, Mr. Ray anticipates that approximately 12,755 two-year personal lines property and casualty agent and life agent licenses will be issued during each of the first two years this proposal is in effect with an application fee of $50 generating $637,750 in annual revenue. During the third through fifth

year the new license types are in effect, Mr. Ray anticipates that the number of original licenses issued by the Department will be approximately 3,996 annually and that renewals will be approximately 8,959 annually. This will result in an estimated 12,995 personal lines property and casualty agent and life agent licenses being issued or renewed annually, generating $647,750 in annual revenue. Mr. Ray further anticipates that the number of temporary licenses issued during each year of the first five years this proposal is in effect will not be affected and thus will have no effect on annual revenue. This lack of effect on annual revenue is due to the fact that any fiscal impact of these license types will result from new licensees who were unable or unwilling to pass the more extensive general agent's examination but are willing or able to pass the personal lines property and casualty agent or life agent examination. A temporary license is a means by which a person can be licensed before passing the examination. The temporary license, however, is not currently used by all carriers, and the Department does not expect that carriers will change how they use the temporary license as result of the enactment of S.B. 1263. Therefore, while the number of applicants for each temporary license may shift between license types, the Department does not expect a measurable increase in the overall number of temporary license applicants. As required by the Texas OnLine Project pursuant to Government Code, §2052.252, a $3 Texas OnLine subscription fee is included in the proposed renewal fee; in accordance with state law, the Department will transfer this fee to the Texas OnLine Authority for each license renewed. This fee is set by the Texas Department of Information Resources under Government Code, §2054.252. The required subscription fee, which is mandated for licensing agencies that participate in Texas Online, is intended to cover the cost of implementation of online licensing services. Each participating licensing agency is required to increase their occupational license renewal fees for their entire licensee population in order to cover the cost of the subscription fee. Additionally, Mr. Ray has determined that, for each year of the first five years the proposed amendments to §19.1002 will be in effect, there will be no fiscal impact to local governments as a result of the enforcement or administration of these amendments. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. Ray has determined that, for each year of the first five years the proposed amendments are in effect, the anticipated public benefit as a result of adopting and administering the proposed amendments will be the effective regulation and continuing education of personal lines property and casualty agent and life agent licensees and protection of persons who contract with personal lines property and casualty agent and life agent licensees. The anticipated public benefit of the proposed amendments to §19.801 and §19.802, concerning licensing fees for personal lines property and casualty agent and life agent licensees will be the payment of fees sufficient to cover Department administration costs, including, among other regulatory protections, licensure, enforcement of statutory and rule requirements, disciplinary actions, and market conduct examinations. The anticipated public benefit of the Texas Online subscription fees charged with each renewal will be increased and more efficient and effective access to state government online licensing services by the public and licensees. The anticipated public benefit of the proposed amendment to §19.1002 concerning the continuing education program is a better informed agent community to serve the public.

The probable economic costs to comply with the proposed amendments to §19.801 and §19.802 result from the Department's adoption of original application, registration, renewal, appointment, and examination fees for the two new license types sufficient to cover the cost of license administration as required by the legislative enactment of S.B. 1263 and the requirements of existing law, including Insurance Code, §4001.006(a) (authorizes the Department to collect a nonrefundable license fee and a nonrefundable appointment fee); §4001.006(c) (authorizes the Department to set fees that are reasonable and necessary to implement and enforce Insurance Code, Title 13); §4001.153 (authorizes the Department to charge and set temporary license fees); §4001.202 (authorizes the Department to charge and set agent appointment fees); §4002.005 (authorizes the Department to charge and set agent licensing examination fees); §4003.004 (authorizes the Department to set license renewal fees); §4003.005 (provides that a renewal fee collected under §4003.004 is nonrefundable); §4051.404 (applies §4001.006 to all fees collected under Chapter 4051, Subchapter I, relating to the new personal lines property and casualty agent license); and §4001.304 (applies §4001.006 to all fees collected under Chapter 4054, Subchapter G, relating to the new life agent license). Under the proposal, the cost for each separate personal lines property and casualty agent and life agent license would be $50 per original application in each year of the first five years the fees are in effect. The cost of renewing each personal lines property and casualty agent and life agent license would be $50 per biennial renewal. The cost of each appointment and subagent appointment would be $10, except that the Department does not charge an appointment fee for one appointment submitted with the original license application. The cost of applying for each temporary license would be $150. Three dollars of the license renewal fee results from the mandated Texas Online Project subscription fee charged pursuant to Government Code, §2054.252, and not from the adoption, enforcement, or administration of the proposed amendments to §19.801 and §19.802. The cost of each Department-administered personal lines property and casualty agent and life agent license examination would be $50, except when the Department contracts with a designated testing service to administer examinations, in which case the fee will be the amount authorized to be charged pursuant to the Department's agreement with the testing contractor.

Costs to comply with the proposed amendments to §19.1002, including the costs associated with continuing education requirements, result from the legislative enactment of S.B. 1263 and existing law and not as a result of the adoption, enforcement, or administration of this proposal.

There is no difference in the costs of compliance between a large and small or micro business as a result of the proposed amendments. The vast majority of the new applicants/licensees that will be subject to the proposed fees will be individuals and agencies that qualify as small or micro businesses under the Government Code, §2006.001. Therefore, it is not feasible or cost effective to waive or reduce the proposed fees for small or micro businesses. Because the Insurance Code, §4001.006, requires the Department to set fees in amounts that are reasonable and necessary to implement and enforce the regulation of agent licensing under the Insurance Code, Title 13, waiving or reducing the proposed fees for small or micro businesses would either significantly and unjustly increase application/licensing costs for individuals and entities that do not qualify as small or micro businesses under §2006.001 of the Government Code or would result in the De-

partment collecting inadequate fees for implementation and enforcement of the law. The Department anticipates that the cost to administer the two new license types will be the same as the cost for administering existing agent license types. Therefore, the Department is proposing the same fees for the new license types as the fees for the existing agent license types. The fees for the existing licensing types are previously adopted fees that have already been determined to comply with the statutory requirements of reasonable and necessary, including for small and micro businesses. The cost of labor per hour is not affected by the proposed amendments, and thus there is no disproportionate economic impact on small or micro businesses due to this cost factor either.

The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code, §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on October 8, 2007, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Matt Ray, Deputy Commissioner, Licensing Division, Mail Code 107-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

SUBCHAPTER I. LICENSING FEES

28 TAC §19.801, §19.802

The amendments are proposed under Insurance Code, §§4001.002, 4001.003(9), 4001.005, 4001.006, 4001.109, 4001.153, 4001.202, 4002.005, 4003.004, 4003.005, 4004.051, 4004.053, 4004.054, 4051.401, 4051.404, 4054.301, 4054.304, and 36.001 and Government Code, §2054.252. Section 4001.002(a)(7) applies the provisions of Title 13, including Subtitle A, to persons licensed under Title 13, Subtitle B (Chapter 4051, Subchapter I, establishing the personal lines property and casualty license and Chapter 4054, Subchapter G, establishing the life agent license, are both within Insurance Code, Title 13 , Subtitle B). Section 4001.003(9) defines subagent. Section 4001.005 authorizes the Commissioner to adopt rules necessary to implement Insurance Code, Title 13. Section 4001.006(a) authorizes the Department to collect a nonrefundable license fee and a nonrefundable appointment fee. Section 4001.006(c) requires the Department to set fees that are reasonable and necessary to implement Insurance Code, Title 13. Section 4001.109 requires a subagent to be licensed to write each line of insurance that the subagent is employed to write but does not require the subagent to hold each kind of license issued to the agent for whom the subagent acts. Section 4001.153 authorizes the Department to charge and set temporary license fees. Section 4001.202 authorizes the Department to charge and set agent multiple insurer appointment fees. Section 4002.005 authorizes the Department to charge and set agent licensing examination fees. Section 4003.004 authorizes the Department to set license renewal fees. Section 4003.005 provides that a renewal fee collected under §4003.004 is nonrefundable. Section 4004.051(a) requires individuals holding a Department issued license to complete continuing education. Section 4004.053(a), as amended by S.B. 1263, requires personal lines property and casualty agents and life agents to complete 15 hours of continuing education annually. Section 4051.051 establishes the general property and casualty license. Section 4051.401 establishes the personal lines property and casualty agent license. Section 4051.404 provides that §4001.006 applies to all fees collected under Chapter 4051, Subchapter I, regulating personal lines property and casualty agent licensing. Section 4054.051 establishes the general life, accident, and health insurance agent license. Section 4054.301 establishes the life agent license. Section 4054.304 provides that §4001.006 applies to all fees collected under Chapter 4054, Subchapter G, regulating life agent licensing. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of the state. Government Code, §2054.252(g) requires the Department to increase licensing fees in an amount sufficient to cover the Department's Texas OnLine Authority subscription fee cost.

The following statutes are affected by the proposal: Government Code, §2054.252; Insurance Code, §§4001.002, 4001.003, 4001.005, 4001.006, 4001.109, 4001.153, 4001.202, 4002.005, 4003.004, 4003.005, 4004.051, 4004.053, 4004.054, 4051.051, 4051.401, 4051.404, 4054.051, 4054.301, and 4054.304; §19.1002; Insurance Code, §§4001.002, 4001.005, 4004.051, 4004.053, 4004.054, 4051.051, 4051.401, 4054.051, and 4054.301

§19.801. General Provisions Regarding Licensing Fees and License Renewal.

(a) - (b) (No change.)

(c) Appointment.

(1) The fee for appointment of a currently licensed general [~~lines~~] agent, personal lines property and casualty agent, or life agent as subagent by another general [~~lines~~] agent, personal lines property and casualty agent, or life agent, or for appointment of an agent to represent additional insurers, health maintenance organizations, or nonprofit legal services corporations, shall accompany the notice of appointment. An appointment fee is not required for the first appointment filed with the original license application.

(2) Subagent appointments must comply with the following requirements:

(A) only general lines agents, personal lines property and casualty agents, or life agents may appoint subagents;

(B) only general lines agents, personal lines property and casualty agents, or life agents may be appointed as subagents; and

(C) as provided in Insurance Code §4001.109, a subagent must be licensed to write each line of insurance that the subagent is employed to write, but is not required to hold each kind of license issued to the agent for whom the subagent acts, as required under Insurance Code §4001.109.

(3) General agents, personal lines property and casualty agents, and life agents may simultaneously have multiple subagent and insurance company appointments.

(d) Submission of fees. All fees shall be submitted by check or money order made payable to the Texas Department of Insurance, except for applicants who must qualify by examination, where the application is to be submitted to the Department's designated testing ser-

vice, as provided under [~~the~~] Insurance Code Chapter 4002, [~~Article 21.01-1,~~] or if the license is renewable over the internet, where the renewal application is to be submitted under the Texas OnLine Project, in which case fees shall be submitted as directed by the designated testing service or the Texas OnLine Authority. Should the Department authorize other online or electronic original applications or other transactions, persons shall submit fees with the transaction as directed by the Department, the Texas OnLine Authority, or the Department's designated service provider.

(e) Fees fully earned. All fees are fully earned at the time the application, registration, and/or appointment is filed with the department, or the department's designated testing service, and are not refundable or transferable to another application, registration or appointment whether such fee is submitted to the department or the department's designated testing service. These fees shall not be reduced for any reason, except when the term of the license is prorated as set forth under subsection (b)(3) of this section.

(f) Examination fees. All fees for examination, whether administered by the department or the department's designated testing service, are fully earned when the examination is scheduled and are not refundable or transferable to any other applicant or examination, except where approved by the department as provided under Insurance Code §4002.005(c) [~~Article 21.01-1 §2(b)~~]. A separate fee is required for each new examination and reexamination. Examination fees shall not be reduced for any reason.

§19.802. Amount of Fees.

(a) (No change.)

(b) The amounts of fees are as follows:

(1) General [~~lines -~~] life, accident, and health insurance agent:

(A) original application--$50;

(B) renewal--$50;

(C) additional appointment--$10;

(D) qualifying examination--$50;

(2) - (4) (No change.)

(5) General [~~lines -~~] property and casualty agent:

(A) original application--$50;

(B) renewal--$50;

(C) additional appointment--$10;

(D) qualifying examination--50;

(E) emergency application for license issued under Insurance Code §4051.054 [~~Article 21.14 §5~~]--$50 (for original application with no additional charge for renewal).

(6) - (7) (No change.)

(8) Managing general agent:

(A) original application--$50;

(B) renewal--$50;

(C) additional appointment--$10;

(D) qualifying examination--$50;

(E) emergency application for license issued under Insurance Code §4053.052 [~~Article 21.07-3 §7~~]--$50.

(9) Limited lines agent (includes agents licensed under Insurance Code Chapter 4051, Subchapter C and Chapter 4054, Subchapter C [~~Articles 21.01-1 §4 and 21.14 §6~~]):

(A) original application--$50;

(B) renewal--$50;

(C) additional appointment--$10;

(D) qualifying examination--$50.

(10) - (17) (No change.)

(18) Temporary license application--For license types authorized by Insurance Code Chapter 4001, Subchapter D [~~Article 21.07 §3A~~] to be issued on a temporary basis, $100 in addition to the original license application fee for each license type.

(19) - (21) (No change.)

(22) Life agent:

(A) original application--$50;

(B) renewal--$50;

(C) additional appointment--$10;

(D) qualifying examination--$50.

(23) Personal lines property and casualty agent:

(A) original application--$50;

(B) renewal--$50;

(C) additional appointment--$10;

(D) qualifying examination--$50;

(c) The limited lines agent license is a single license type that is authorized under [~~two~~] Insurance Code Chapters 4051 and 4054 [~~articles~~]. Persons licensed as limited lines agents may be appointed to sell or solicit any line authorized by Insurance Code Chapter 4051, Subchapter C and Chapter 4054, Subchapter C [~~Articles 21.07-1 §4 and/or 21.14 §6~~] without payment of additional license fees or examinations other than the necessary additional company appointment fees.

(d) A general [~~lines~~] agent, personal lines property and casualty agent, or life agent appointed as subagent by another general [~~lines~~] agent, personal lines property and casualty agent, or life agent is not a separate license type. All fees are the same for a general agent, personal lines property and casualty agent, or life agent [~~lines agents~~] appointed as subagents, as are the fees for a general agent, personal lines property and casualty agent, or life agent [~~lines agents~~] appointed by insurance companies. [~~Only general lines agents may appoint subagents and the subagent must be licensed as a general lines agent. General lines agents may simultaneously have multiple subagent and insurance company appointments.~~]

(e) All fees are the same for both residents and nonresidents. Insurance Code Chapter 4056 [~~Article 21.11~~] does not create an additional license type for nonresidents, but designates a procedure for licensing nonresidents under appropriate Texas license types.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 27, 2007.

TRD-200703908

Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-6327

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SUBCHAPTER K. CONTINUING EDUCATION AND ADJUSTER PRELICENSING EDUCATION PROGRAMS

28 TAC §19.1002

The amendments are proposed under Insurance Code §§4001.002, 4001.003(9), 4001.005, 4001.006, 4001.109, 4001.153, 4001.202, 4002.005, 4003.004, 4003.005, 4004.051, 4004.053, 4004.054, 4051.401, 4051.404, 4054.301, 4054.304, and 36.001 and Government Code, §2054.252. Section 4001.002(a)(7) applies the provisions of Title 13, including Subtitle A, to persons licensed under Title 13, Subtitle B (Chapter 4051, Subchapter I, establishing the personal lines property and casualty license and Chapter 4054, Subchapter G, establishing the life agent license, are both within Insurance Code, Title 13 , Subtitle B). Section 4001.003(9) defines subagent. Section 4001.005 authorizes the Commissioner to adopt rules necessary to implement Insurance Code, Title 13. Section 4001.006(a) authorizes the Department to collect a nonrefundable license fee and a nonrefundable appointment fee. Section 4001.006(c) requires the Department to set fees that are reasonable and necessary to implement Insurance Code, Title 13. Section 4001.109 requires a subagent to be licensed to write each line of insurance that the subagent is employed to write but does not require the subagent to hold each kind of license issued to the agent for whom the subagent acts. Section 4001.153 authorizes the Department to charge and set temporary license fees. Section 4001.202 authorizes the Department to charge and set agent multiple insurer appointment fees. Section 4002.005 authorizes the Department to charge and set agent licensing examination fees. Section 4003.004 authorizes the Department to set license renewal fees. Section 4003.005 provides that a renewal fee collected under §4003.004 is nonrefundable. Section 4004.051(a) requires individuals holding a Department issued license to complete continuing education. Section 4004.053(a), as amended by S.B. 1263, requires personal lines property and casualty agents and life agents to complete 15 hours of continuing education annually. Section 4051.051 establishes the general property and casualty license. Section 4051.401 establishes the personal lines property and casualty agent license. Section 4051.404 provides that §4001.006 applies to all fees collected under Chapter 4051, Subchapter I, regulating personal lines property and casualty agent licensing. Section 4054.051 establishes the general life, accident, and health insurance agent license. Section 4054.301 establishes the life agent license. Section 4054.304 provides that §4001.006 applies to all fees collected under Chapter 4054, Subchapter G, regulating life agent licensing. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of the state. Government Code §2054.252(g) requires the Department to increase licensing fees in an amount sufficient to cover the Department's Texas OnLine Authority subscription fee cost.

The following statutes are affected by the proposal: Government Code, §2054.252; Insurance Code, §§4001.002, 4001.003, 4001.005, 4001.006, 4001.109, 4001.153, 4001.202, 4002.005, 4003.004, 4003.005, 4004.051, 4004.053, 4004.054, 4051.051, 4051.401, 4051.404, 4054.051, 4054.301, and 4054.304; §19.1002; Insurance Code, §§4001.002, 4001.005 4004.051, 4004.053, 4004.054, 4051.051, 4051.401, 4054.051, and 4054.301

§19.1002. Definitions.

(a) Words and terms defined in Insurance Code §4001.003 [~~Article 21.07 §1A~~] shall have the same meaning when used in this subchapter.

(b) The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adjuster--An individual licensed under Insurance Code Chapter 4101 [~~Article 21.07-4~~].

(2) - (15) (No change.)

(16) Licensee--An individual licensed under one or more of the following Insurance Code provisions: [~~An adjuster or individual holding a license under the authority of Insurance Code Articles 21.07-1 §§2, 4 or 6 (general lines - life, accident, and health agent, limited lines agent, or life insurance not exceeding $15,000 agent); 21.07-2 (life and health insurance counselor); 21.07-3 (managing general agent); 21.07-5 (public insurance adjuster); or 21.14 §§2, 6, 8, or 9 (general lines - property and casualty agent, limited lines agent, insurance service representative or county mutual agent).~~]

(A) Chapter 4051, Subchapters B, C, D, E, and I (general property and casualty agent, limited lines agent, insurance service representative, county mutual agent, and personal lines property and casualty agent);

(B) Chapter 4052 (life and health insurance counselor);

(C) Chapter 4053 (managing general agent);

(D) Chapter 4054, Subchapters B, C, E, and G (general lines - life, accident, and health agent, limited lines agent, life insurance not exceeding $15,000 agent, and life agent);

(E) Chapter 4101 (adjuster);

(F) Chapter 4102 (public insurance adjuster).

(17) - (18) (No change.)

(19) Provider--An individual or organization including a corporation, partnership, depository institution, insurance company, or entity chartered by the Farm Credit Administration as defined in Insurance Code §4001.108 [~~Article 21.07 §2(v)~~], registered with the department to offer continuing education courses for licensees and/or prelicensing instruction for adjusters.

(20) - (27) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 27, 2007.

TRD-200703909

Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 37. FINANCIAL ASSURANCE

The Texas Commission on Environmental Quality (TCEQ, agency or commission) proposes amendments to §§37.9001, 37.9030, 37.9035, 37.9040, and 37.9045.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The primary purpose of the proposed rules is to implement Senate Bill (SB) 1604, 80th Legislature, 2007, and its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)). The bill transfers responsibilities for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the Texas Department of State Health Services (department) to the commission. This proposed rulemaking intends to transfer the technical requirements for these programs from the department's rules in 25 TAC §289.254 and §289.260 into new subchapters of the commission's radioactive substantive rules in Chapter 336. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The proposed amendments to Chapter 37 establish the financial assurance requirements for licenses for uranium recovery, by-product disposal, and radioactive substances storage and processing. The commission proposes that the existing financial assurance requirements of Subchapter T of Chapter 37 be used for the licensing programs subject to the transfer of jurisdiction in SB 1604. SB 1604 also establishes a new state fee for disposal of radioactive substances and amends underground injection control requirements for uranium mining. The commission intends to address the new requirements in separate rulemaking actions.

SECTION BY SECTION DISCUSSION

The commission proposes amendments to §37.9001 to clarify that the financial assurance requirements of Subchapter S of Chapter 37 only apply to radioactive material licenses for alternative methods of disposal of radioactive material under Subchapter F of Chapter 336 and licenses for the commercial disposal of naturally occurring radioactive material from public water systems under Subchapter K of Chapter 336. The financial assurance requirements of Subchapter T of Chapter 37 will apply to decommissioning of facilities under Subchapter G of Chapter 336, licenses for the disposal of low-level radioactive waste under Subchapter H of Chapter 336, licenses for the recovery of source material or by-product disposal under Subchapter L of Chapter 336, and licenses for the storage and processing of radioactive substances under Subchapter M of Chapter 336.

The commission proposes amendments to §37.9030 to establish financial assurance requirements under Subchapter T of Chapter 37 for decommissioning activities under Subchapter G of Chapter 336, licenses for the disposal of low-level radioactive waste under Subchapter H of Chapter 336, licenses for the recovery of source material or by-product disposal under Subchapter L of Chapter 336, and licenses for the storage and processing of radioactive substances under Subchapter M of Chapter 336. There are two primary differences between Subchapter S and Subchapter T of Chapter 37. First, the financial test is not an acceptable financial assurance mechanism under Subchapter T. Second, there are additional requirements for the use of insurance as a financial assurance mechanism. The commission proposes to use the more stringent Subchapter T financial assurance requirements for the licensing programs that are subject to the transfer of SB 1604 so that there is enhanced assurance that the state has adequate funds to perform closure or post closure activities should a licensee fail to perform the required activities.

The commission proposes amendments to §37.9035 to change the definition of facility so that the term includes all contiguous land, water, buildings, structures, and equipment for activities associated with the recovery of uranium under Subchapter L of Chapter 336 or the processing and storage of radioactive substances under Subchapter M of Chapter 336.

The commission proposes amendments to §37.9040 to require that effective financial assurance mechanisms must be provided to the executive director 60 days prior to the initial receipt or possession of radioactive substances.

The commission proposes amendments to §37.9045 to provide that the executive director may accept financial assurance established to meet requirements of other entities for closure or post closure, provided that such mechanisms comply with all TCEQ requirements of Chapter 37 and the full amount of financial assurance for the license is clearly identified and committed for use for the purposes of Subchapters G, H, L, or M of Chapter 336. The commission proposes an amendment to subsection (a)(6) to include citations to 30 TAC §336.1125 and §336.619 should the executive director be required to convert a financial assurance mechanism into cash for deposit into the perpetual care account.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for the commission and the Texas Department of State Health Services (department) due to administration or enforcement of the proposed rules. No fiscal implications are anticipated for other units of state or local government.

The primary purpose of the proposed rules is to implement SB 1604, 80th Legislature, 2007. The bill transfers responsibilities for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department to the commission. This proposed rulemaking intends to transfer the technical requirements for these programs from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and admin-

istered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. Some proposed rule changes are needed for purposes of clarification or to conform to Secretary of State requirements for rule publication. The proposed amendments would establish the procedural requirements for the technical review of radioactive material licenses under Chapter 336, as well as public notice requirements and financial assurance requirements for radioactive materials licenses under Chapters 37, 39, and 281.

SB 1604 also establishes a new state fee for disposal of radioactive substances and amends underground injection control requirements for uranium mining. The commission intends to address the new state fee and underground injection control requirements in separate rulemakings.

SB 1604 transfers regulatory authority to the TCEQ for commercial radioactive waste processing, uranium mining, and by-product disposal. The department's technical rules are being transferred to the TCEQ through these proposed rules. The legislature provided $200,000 plus the unexpended and un-obligated portions of the appropriations for the state fiscal biennium beginning September 1, 2005, made to the Health and Human Services Commission or the department for activities related to the transfer. Authority for eleven Full-Time Equivalents (FTEs) was transferred from the department to the commission.

Legislative appropriations for fiscal year 2008 and fiscal year 2009 provided that all appropriations made to the department relating to the regulation of radioactive substances, estimated to be $988,771 in fiscal year 2008 and $897,931 in fiscal year 2009 out of the General Revenue Fund, and associated Full-Time Equivalent Positions (estimated to be 11.0) were to be transferred from the department to the TCEQ. In addition to these amounts, the TCEQ was also appropriated out of the Waste Management Account Number 549 in Strategy A.2.3, Waste Management and Permitting, $471,388 in fiscal year 2008 and $460,728 in fiscal year 2009, to be used for the regulation of radioactive substances. This funding was to come from additional fee revenue the agency would be collecting for administering these new responsibilities.

The number of FTEs for the TCEQ was also increased by four in each fiscal year of the 2008-2009 biennium, for a total of 15 FTEs. The appropriations are contingent upon the agency assessing fees sufficient to generate, during the 2008-2009 biennium, revenue to cover, at a minimum, the appropriations, as well as "Other direct and indirect costs" for the program. Other direct and indirect costs are estimated to be $62,213 in each fiscal year of the 2008-2009 biennium. In the event that actual and/or projected revenue collections are insufficient to offset the costs identified by this provision, the Legislative Budget Board may direct the Comptroller of Public Accounts to reduce the appropriation authority to be within the amount of revenue expected to be available.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and increased efficiency of the regulation of radioactive substance processing, storage and disposal through consolidation of these activities at one state agency.

No fiscal implications are anticipated for businesses and individuals as a result of the proposed rules. The proposed rulemaking intends to transfer the technical requirements for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The fees to industry and business are not changing as a result of the proposed rules. The proposed rules simply transfer the existing licensing fees from the department to the TCEQ.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are expected for small or micro-businesses as a result of the proposed rules. The proposed rulemaking intends to transfer the technical requirements for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The fees to industry and business are not changing as a result of the proposed rules. The proposed rules simply transfer the existing licensing fees from the department to the TCEQ.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission proposes the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 37 establish the financial assurance requirements for radioactive material licenses. Financial assurance was already required by the department. The proposed amendments to Chapter 37 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the amendments establish procedural requirements for radioactive substance disposal facilities, source material recovery facilities, or commercial radioactive substances storage and processing facilities. The proposed rulemaking action implements legislative requirements in SB 1604, transferring

responsibilities for the regulation of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department to the commission. The proposed rulemaking action also transfers the technical requirements for these licensing programs from the department's existing rules to the commission's rules in Chapter 336, establishes the public notice requirements in Chapter 39, and establishes application processing requirements in Chapter 281.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, the State of Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rules are compatible with federal law.

The proposed rules do not exceed an express requirement of state law. The Texas Health and Safety Code, Chapter 401, establishes general requirements, including requirements for financial assurance, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to Texas Health and Safety Code, Chapter 401, as provided in SB 1604.

The proposed rules are compatible with a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State."

These rules are proposed under specific authority of the Texas Health and Safety Code, Chapter 401. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances.

The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules. These proposed rules implement SB 1604, transferring certain regulatory responsibilities for the control of radioactive material from the department to the commission. This proposed rulemaking is reasonably taken to fulfill an obligation required by federal law for the control of radioactive material, which is an exempt action under Texas Government Code, §2007.003(b)(4).

Nevertheless, the commission further evaluated these proposed rules and performed a preliminary assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these proposed rules is to implement changes to the Texas Radiation Control Act required by SB 1604, 80th Legislature, 2007 for the issuance of public notice for the licensing of the disposal of radioactive substances, recovery of source material, and commercial radioactive substances processing and storage. The proposed rules would substantially advance this purpose by establishing the financial assurance requirements for the licenses that are subject to the transfer of jurisdiction under SB 1604.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The proposed rules establish financial assurance requirements and do not affect real property. Financial assurance was required by the department for these programs, and the proposed rules do not substantially change the existing requirements that were in place under the department's program. Therefore, the commission's proposed rules do not affect real property in a manner that is different than may have been affected under the department's requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and determined that the proposed rules are neither identified in, nor will they affect, any action/authorization identified in Coastal Coordination Act Implementation Rules in 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the proposed rulemaking action is not subject to the CMP.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 25, 2007, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Indi-

viduals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at http://www5.tceq.state.tx.us/rules/ecomments/. File size restrictions may apply to comments submitted via the eComments system. All comments should reference Rule Project Number 2007-028-336-PR. The comment period closes October 15, 2007. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Susan Jablonski, Director, Radioactive Materials Division, (512) 239-6731.

SUBCHAPTER S. FINANCIAL ASSURANCE FOR ON SITE DISPOSAL OF RADIOACTIVE SUBSTANCES

30 TAC §37.9001

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendment is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendment implements Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§37.9001. Applicability.

This subchapter applies to an owner or operator, including a state or federal government owner or operator, required to provide evidence of financial assurance under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material) or Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems) [~~Radioactive Substance Rules), except owners or operators of a facility licensed under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste)~~]. This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure and post closure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703832
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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SUBCHAPTER T. FINANCIAL ASSURANCE FOR RADIOACTIVE SUBSTANCES

30 TAC §§37.9030, 37.9035, 37.9040, 37.9045

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides

the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments implement Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§37.9030. Applicability.

This subchapter applies to owners or operators required to provide financial assurance under Chapter 336, Subchapters G, H, L, or M [~~Subchapter H~~] of this title (relating to Decommissioning Standards; Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste; Licensing of Uranium Recovery and By-Product Material Disposal Facilities; or Licensing of Radioactive Substances Processing and Storage Facilities). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure, post closure, corrective action, and liability coverage.

§37.9035. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), §336.2 of this title (relating to Definitions), and §336.702 of this title (relating to Definitions), except the following definitions shall apply for this subchapter.

(1) - (3) (No change.)

(4) Facility--The term "Facility" has the same meaning as the term "Site" as defined in §336.702 of this title (relating to Definitions). Facility also means all [~~All~~] contiguous land, water, buildings, structures, and equipment which are or were used for activities associated with:

(A) the disposal of radioactive material, including disposal, receipt, storage, processing, or handling of radioactive material, waste, soil, and groundwater contaminated by radioactive material; [~~. The term "Facility" has the same meaning as the term "Site" as defined in §336.702 of this title.~~]

(B) the recovery of uranium as provided in Chapter 336, Subchapter L of this title (relating to Licensing of Uranium Recovery and By-Product Material Disposal Facilities); or

(C) the processing and storage of radioactive substances as provided in Chapter 336, Subchapter M of this title (relating to Licensing of Radioactive Substances Processing and Storage Facilities).

(5) - (7) (No change.)

§37.9040. Submission of Documents.

An owner or operator required by this subchapter to provide financial assurance for closure, post closure, corrective action, and liability coverage must submit originally signed and effective financial assurance mechanisms to the executive director 60 days prior to the initial receipt or possession of radioactive substances [~~waste~~].

§37.9045. Financial Assurance Requirements for Closure, Post Closure, and Corrective Action.

(a) An owner or operator subject to this subchapter shall establish financial assurance for the closure, post closure, and corrective action of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

(1) - (3) (No change.)

(4) The executive director may accept financial assurance established to meet requirements of other federal, state agencies, or local governing bodies for closure or post closure, provided such mechanism complies with the requirements of this chapter and the full amount of financial assurance required for the specific license is clearly identified and committed for use for the purposes of Chapter 336, Subchapters G, H, L and M [~~Subchapter H~~] of this title (relating to Decommissioning Standards; Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste; Licensing of Uranium Recovery and By-Product Material Disposal Facilities; and Licensing of Radioactive Substances Processing and Storage Facilities).

(5) (No change.)

(6) All financial assurance required to be converted to cash by direction of the executive director under §§336.736 - 336.738, 336.1125(c), (f) and (g), 336.619 and 37.101 of this title (relating to Funding for Disposal Site Closure and Stabilization; Funding for Institutional Control; Funding for Corrective Action; Financial Security Requirements; Financial Assurance for Decommissioning; and Drawing on the Financial Assurance Mechanisms) and paragraph (5) of this subsection shall be deposited to the credit of the perpetual care account.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703833
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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CHAPTER 39. PUBLIC NOTICE
SUBCHAPTER M. PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES

30 TAC §§39.702, 39.703, 39.707, 39.709

The Texas Commission on Environmental Quality (TCEQ, agency or commission) proposes amendments to §§39.702, 39.703, 39.707, and 39.709.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The primary purpose of the proposed rules is to implement Senate Bill (SB) 1604, 80th Legislature, 2007, and its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)). The bill transfers responsibilities for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the Texas Department

of State Health Services (department) to the commission. This proposed rulemaking intends to transfer the technical requirements for these programs from the department's rules in 25 TAC §289.254 and §289.260 into new subchapters of the commission's radioactive substantive rules in Chapter 336. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The proposed amendments to Chapter 39, Subchapter M establish the public notice requirements for radioactive materials licenses issued under Chapter 336. SB 1604 also establishes a new state fee for disposal of radioactive substances and amends underground injection control requirements for uranium mining. The commission intends to address the new requirements in separate rulemaking actions.

SECTION BY SECTION DISCUSSION

Subchapter M. Public Notice for Radioactive Material Licenses

§39.702. Notice of Declaration of Administrative Completeness.

The commission proposes to amend §39.702 to clarify that the notice of declaration of administrative completeness must be published in a newspaper according to the requirements of §39.707.

§39.703. Notice of Completion of Technical Review.

The commission proposes to amend §39.703 to establish uniform notice requirements for the notices of completion of technical review for all radioactive material license applications under Chapter 336. The commission proposes to require public notice providing a thirty day comment and hearing request period on applications for new licenses, renewals, and major amendments. The commission proposes to require a ten day comment and hearing request period on notices for minor amendments of all radioactive material licenses under Chapter 336.

§39.707. Published Notice.

The commission proposes to amend §39.707 to establish public notice requirements for licenses for source material recovery, by-product disposal, and storage and processing of radioactive materials.

§39.709. Notice of Contested Case Hearing on Application.

The commission proposes to amend §39.709 to establish public notice requirements for the notice of hearing on applications for radioactive material license. The commission proposes to add new §39.709(d) to implement §33(k)(4) of SB 1604.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for the commission and the Texas Department of State Health Services (department) due to administration or enforcement of the proposed rules. No fiscal implications are anticipated for other units of state or local government.

The primary purpose of the proposed rules is to implement SB 1604, 80th Legislature, 2007. The bill transfers responsibilities for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department to the commission. This proposed rulemaking intends to transfer the technical requirements for these programs from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. Some proposed rule changes are needed for purposes of clarification or to conform to Secretary of State requirements for rule publication. The proposed amendments to Chapter 39 would establish the public notice requirements for radioactive material licenses under Chapter 336.

SB 1604 also establishes a new state fee for disposal of radioactive substances and amends underground injection control requirements for uranium mining. The commission intends to address the new state fee and underground injection control requirements in separate rulemakings.

SB 1604 transfers regulatory authority to the TCEQ for commercial radioactive waste processing, uranium mining, and by-product disposal. The department's technical rules are being transferred to the TCEQ through these proposed rules. The legislature provided $200,000 plus the unexpended and un-obligated portions of the appropriations for the state fiscal biennium beginning September 1, 2005, made to the Health and Human Services Commission or the department for activities related to the transfer. Authority for eleven Full-Time Equivalents (FTEs) was transferred from the department to the commission.

Legislative appropriations for fiscal year 2008 and fiscal year 2009 provided that all appropriations made to the department relating to the regulation of radioactive substances, estimated to be $988,771 in fiscal year 2008 and $897,931 in fiscal year 2009 out of the General Revenue Fund, and associated Full-Time Equivalent Positions (estimated to be 11.0) were to be transferred from the department to the TCEQ. In addition to these amounts, the TCEQ was also appropriated out of the Waste Management Account Number 549 in Strategy A.2.3, Waste Management and Permitting, $471,388 in fiscal year 2008 and $460,728 in fiscal year 2009, to be used for the regulation of radioactive substances. This funding was to come from additional fee revenue the agency would be collecting for administering these new responsibilities.

The number of FTEs for the TCEQ was also increased by four in each fiscal year of the 2008-2009 biennium, for a total of 15 FTEs. The appropriations are contingent upon the agency assessing fees sufficient to generate, during the 2008-2009 biennium, revenue to cover, at a minimum, the appropriations, as well as "Other direct and indirect costs" for the program. Other direct and indirect costs are estimated to be $62,213 in each fiscal year of the 2008-2009 biennium. In the event that actual and/or projected revenue collections are insufficient to offset the costs identified by this provision, the Legislative Budget Board may direct the Comptroller of Public Accounts to reduce the appropriation authority to be within the amount of revenue expected to be available.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and increased efficiency of the regu-

lation of radioactive substance processing, storage and disposal through consolidation of these activities at one state agency.

No fiscal implications are anticipated for businesses and individuals as a result of the proposed rules. The proposed rulemaking intends to transfer the technical requirements for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The fees to industry and business are not changing as a result of the proposed rules. The proposed rules simply transfer the existing licensing fees from the department to the TCEQ.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are expected for small or micro-businesses as a result of the proposed rules. The proposed rulemaking intends to transfer the technical requirements for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The fees to industry and business are not changing as a result of the proposed rules. The proposed rules simply transfer the existing licensing fees from the department to the TCEQ.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission proposes the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 39 establish procedural requirements for the issuance of public notice for a license application. The proposed amendments to Chapter 39 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the amendments establish procedural requirements for radioactive substance disposal facilities, source material recovery facilities, or commercial radioactive substances storage and processing facilities. The proposed rulemaking action implements legislative requirements in SB 1604, transferring responsibilities for the regulation of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department to the commission. The proposed rulemaking action transfers the technical requirements for these licensing programs from the department's existing rules to the commission's rules in Chapter 336 and establishes the public notice requirements in Chapter 39.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, the State of Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rules are compatible with federal law.

The proposed rules do not exceed an express requirement of state law. The Texas Health and Safety Code, Chapter 401, establishes general requirements, including requirements for public notices, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to Texas Health and Safety Code, Chapter 401, as provided in SB 1604.

The proposed rules are compatible with a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rules are compatible with the NRC requirements and the requirements for retaining status as an "Agreement State."

These rules are proposed under specific authority of the Texas Health and Safety Code, Chapter 401. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to

adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether the Private Real Property Rights Preservation Act, Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules. These proposed rules implement SB 1604, transferring certain regulatory responsibilities for the control of radioactive material from the department to the commission. This proposed rulemaking is reasonably taken to fulfill an obligation required by federal law for the control of radioactive material, which is an exempt action under Texas Government Code, §2007.003(b)(4).

Nevertheless, the commission further evaluated these proposed rules and performed a preliminary assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these proposed rules is to implement changes to the Texas Radiation Control Act required by SB 1604, 80th Legislature, 2007 for the issuance of public notice for the licensing of the disposal of radioactive substances, recovery of source material, and commercial radioactive substances processing and storage. The proposed rules would substantially advance this purpose by requiring public notices on license applications subject to the commission's jurisdiction under TRCA as amended by SB 1604.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The proposed rules establish public notice requirements and do not affect real property. The proposed rules do not change the existing technical requirements that were in place under the department's program. Therefore, the commission's proposed rules do not affect real property in a manner that is different than may have been affected under the department's requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and determined that the proposed rules are neither identified in, nor will they affect, any action/authorization identified in Coastal Coordination Act Implementation Rules in 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the proposed rulemaking action is not subject to the CMP.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 25, 2007, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at http://www5.tceq.state.tx.us/rules/ecomments/. File size restrictions may apply to comments submitted via the eComments system. All comments should reference Rule Project Number 2007-028-336-PR. The comment period closes October 15, 2007. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Susan Jablonski, Director, Radioactive Materials Division, (512) 239-6731.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments implement Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§39.702. Notice of Declaration of Administrative Completeness.

When an application under Chapter 336 of this title (relating to Radioactive Substance Rules) has been declared administratively complete, the chief clerk shall mail notice under this subchapter. The appli-

cant shall publish the notice of declaration of administrative completeness as provided in §39.707 of this title (relating to Published Notice).

§39.703. Notice of Completion of Technical Review.

(a) When the executive director has completed the technical review of an application for a license, major amendment, or renewal of a license issued under Chapter 336 of this title (relating to Radioactive Substance Rules) [~~or for a minor amendment issued under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste)~~], notice must be mailed by the Office of the Chief Clerk and published under this subchapter. The deadline to file public comment, protests, or hearing requests is 30 days after publication.

(b) For [~~any other~~] application for a minor amendment to a license issued under Chapter 336 of this title[~~, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this title (relating to Decommissioning Standards), or Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems)~~], notice must be mailed by the Office of the Chief Clerk under this subchapter. The deadline to file public comment, protests, or hearing requests is ten days after mailing.

§39.707. Published Notice.

(a) For applications under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this title (relating to Decommissioning Standards), [~~or~~] Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems), Subchapter L of this title (relating to Licensing of Uranium Recovery and By-product Material Disposal Facilities), or Subchapter M of this title (relating to Licensing of Radioactive Substances Processing and Storage Facilities), when notice is required to be published under this subchapter, the applicant shall publish notice at least once in a newspaper of largest general circulation in the county in which the facility is located.

(b) (No change.)

(c) In addition to published notice requirements in subsection (b) of this section, for an initial notice of draft license and opportunity to comment and for any subsequent license amendment of a license under Chapter 336, Subchapter H of this title or Subchapter M of this title, the chief clerk shall publish notice once in the *Texas Register*.

§39.709. Notice of Contested Case Hearing on Application.

(a) (No change.)

(b) Except as provided in subsection (d) of this section, for [~~For~~] applications under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this title (relating to Decommissioning Standards), [~~or~~] Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems), or Subchapter L of this title (relating to Licensing of Uranium Recovery and By-product Material Disposal Facilities), notice must be mailed no later than 30 days before the hearing. For applications under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) or Subchapter M of this title (relating to Licensing of Radioactive Substances Processing and Storage Facilities), notice must be mailed no later than 31 days before the hearing.

(c) (No change.)

(d) For an application for a new license to dispose of by-product material under Chapter 336, Subchapter L of this title that was filed with the Department of State Health Services on or before January 1, 2007, notice under this section must be provided to the applicant, the office of public interest counsel, the executive director, and any person who timely submitted a request for a contested case hearing at least 10 days in advance of the hearing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703834
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.114

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §116.114.

If adopted, the proposed amended section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

House Bill (HB) 3732, passed by the 80th Legislature (2007), requires that the commission adopt rules relating to permitting of Advanced Clean Energy Projects (ACEP). House Bill 3732 and the associated proposed rule changes are intended to provide an incentive for the development of advanced, clean power projects in Texas. The legislation established new Texas Health and Safety Code (THSC), §382.0566, Advanced Clean Energy Project Permitting Procedure, which specifies certain deadlines for TCEQ's air permit review for qualifying projects and directs TCEQ to incorporate those deadlines into commission rules. The deadlines are intended to ensure that permit applications for ACEP are processed in an expedited manner.

House Bill 3732 established a definition of ACEP under THSC, §382.003, Definitions. Under this definition, an ACEP must meet the following criteria: (1) an application for a permit is filed on or after January 1, 2008 and before January 1, 2020; (2) the project involves the use of coal, biomass, petroleum coke, solid waste, or fuel cells using hydrogen derived from such fuels, in the generation of electricity, or the creation of liquid fuels outside of the existing fuel production infrastructure while co-generating electricity; (3) the project is capable of achieving on an annual basis a 99 percent or greater reduction of sulfur dioxide emissions, a 95 percent or greater reduction in mercury emissions, and a nitrogen oxides emission rate of 0.05 pounds or less per million British thermal units; and (4) the project renders carbon dioxide

capable of capture, sequestration, or abatement if any carbon dioxide is produced.

As required by THSC, §382.0566, the proposed rule amendment specifies that the executive director shall complete the technical review of an ACEP permit application no later than nine months after the application is declared to be administratively complete and shall issue a final order issuing or denying the permit no later than nine months after the application is declared to be technically complete. The proposed rule amendment allows an extension of up to three months if the number of pending applications will prevent the commission from meeting the specified deadlines without creating an extraordinary burden on the resources of the commission. The proposed rule amendment does not exempt ACEP permit applications from applicable requirements relating to contested case hearings.

The commission specifically invites comment on whether or not the executive director should directly refer all ACEP air permit applications to the State Office of Administrative Hearings in order to ensure that hearings and permit issuance or denial can be completed within the deadlines specified in THSC, §382.0566.

SECTION DISCUSSION

§116.114. Application Review Schedule.

The commission proposes to amend §116.114 to implement provisions of HB 3732 and THSC, §382.0566. The proposed amendment would revise §116.114(a) to add deadlines associated with the review of ACEP permit applications. These new deadlines would only apply to the processing of permit applications for ACEP as defined in THSC, §382.003(1-a). However, the processing of ACEP permit applications would also be subject to existing applicable requirements and deadlines specified elsewhere in §116.114, in cases where those requirements or deadlines are more stringent than the proposed amendment. ACEP permit applications remain subject to applicable requirements relating to contested case hearings.

Proposed §116.114(a)(3)(A) states that the executive director shall complete the technical review of an ACEP permit application no later than nine months after the application is declared to be administratively complete. Proposed §116.114(a)(3)(B) states that the commission shall issue a final order issuing or denying the permit no later than nine months after the application is declared to be technically complete. The proposed rule amendment allows an extension of up to three months if the number of pending applications will prevent the commission from meeting the specified deadlines without creating an extraordinary burden on the resources of the commission.

Existing §116.114(a)(3), relating to refunds of permit fees, is proposed to be renumbered as §116.114(a)(4).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule amendment is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rule amendment. The proposal implements legislative mandates regarding the agency's review of air permit applications for ACEP and streamlines the process so that the agency could issue the permit within shorter legislated time frames. These shorter time frames will require the agency to prioritize ACEP permit applications and allocate existing staff resources to meet required deadlines. The State Office of Administrative Hearings may also be required to schedule ACEP permit hearings sooner in order to help the agency meet rule deadlines. The actual number and timing of ACEP permit applications TCEQ will receive is not known, but the volume is expected to be light (less than 3 per year). The effects most likely will not vary greatly over the next five years.

The proposed rule amendment is required by HB 3732, passed by the 80th Legislature, Regular Session, which sets the deadlines and directed TCEQ to adopt corresponding rules no later than January 1, 2008. The intent of HB 3732 and the associated rules is to provide an incentive to encourage the development of certain types of electric power projects that meet stringent emission limits. The proposed rule amendment would establish deadlines for the agency's review of air permit applications for ACEP, in order to ensure that those permits are issued in an expedited manner. The rule proposal would require that the executive director complete the technical review of an ACEP permit application within nine months of determining the application is administratively complete. The rule proposal also requires the commission to issue a final order issuing or denying the permit within nine months of the date the executive director determines the application is technically complete. The commission has discretion to extend this deadline by up to three months, if meeting the deadline would create an extraordinary burden on commission resources.

It is possible that local governments may elect to initiate advanced clean energy projects and could benefit from the shorter permit deadlines. The number of government entities who will elect to begin advanced clean energy projects is not known, but is expected to be less than three per year. The shorter permit deadlines in the proposed rule amendment may allow government-owned or government-operated utilities to achieve a somewhat faster return on their investment in new power projects. Quantifying this benefit is very difficult, as it would depend heavily on circumstances unique to each individual project.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that, for each year of the first five years the proposed rule amendment is in effect, the public benefit anticipated from the changes seen in the rule proposal will be compliance with state law and the encouragement of permit applicants to use low-emission technology more stringent than otherwise required in electric power projects. Use of this technology is expected to result in cleaner air and greater protection of public health and safety.

The number of facilities or businesses that may elect to initiate ACEP projects is unknown, but is most likely less than three new units per year. The type of facilities that would benefit from the rule proposal are new electric generating units that use coal, biomass, petroleum coke, solid waste, or fuel cells to make electricity, and meet the low-emission profile specified in HB 3732. The shorter permit deadlines in the proposed rule amendment may allow a large business that owns or operates utilities to achieve a somewhat faster return on their investment in new power projects. Quantifying this benefit is very difficult, as it would depend heavily on circumstances unique to each individual project.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule amendment. Small or micro-businesses are not likely to initiate large, ad-

vanced electric utility projects; and the expedited permit process for ACEPs is not expected to have an impact on them.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule amendment does not adversely affect a local economy in a material way for the first five years that the rule proposal is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule." Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state. The proposed rulemaking is not a major environmental rule because it is procedural in nature. The rule proposal does not prescribe control requirements or any other requirements that would normally be associated with a commission environmental rulemaking. House Bill 3732 and THSC, §382.0566, address processing ACEP applications in an expedited manner. The proposed amendment to §116.114 merely implements the deadlines for TCEQ's review of ACEP applications. Further, the rule proposal does not add any requirements that would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state.

In addition, a draft regulatory impact analysis is not required because the rule does not meet any of the four applicability criteria for requiring a regulatory impact analysis of a major environmental rule as defined in the Texas Government Code. Section 2001.0225 applies only to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking proposal does not exceed a standard set by federal law, and the proposed requirements are consistent with applicable federal standards. In addition, this proposal does not exceed an express requirement of state law and is not adopted solely under the general powers of the agency, but is specifically authorized by the provisions cited in the STATUTORY AUTHORITY section of this preamble. Finally, this proposed rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the proposed rule amendment is subject to Texas Government Code, Chapter 2007. The primary purpose of the proposed rulemaking is to implement deadlines created by HB 3732 and THSC, §382.0566, relating to TCEQ's air permit review for ACEP applications so that the applications are processed in an expedited manner. This amendment does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Promulgation and enforcement of this proposed rule amendment is neither a statutory nor a constitutional taking because it does not affect private real property. Therefore, this rule proposal does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP.

The commission reviewed this rulemaking proposal for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the proposed amendment is consistent with CMP goals and policies because the rulemaking proposal is a procedural rule that will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the proposed amendment will not violate or exceed any standards identified in the applicable CMP goals and policies. The proposed rule amendment ensures that air permit applications for ACEP are reviewed by the TCEQ in an expedited manner. The proposed rule amendment would not affect the technical criteria that are used to evaluate such permit applications and would not change applicable public participation requirements for the permit application. The proposed rule amendment would not affect the type of emission control technology required by the permit and would not affect the authorized emission rates from permitted facilities.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The proposed amendment relates to timeframes and deadlines associated with the review of new source review permit applications. The proposed amendment affects all sites equally and has no specific effect on sites subject to the Federal Operating Permits Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 24, 2007, at 2:00 p.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle, in Building F, Room 2210. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during

the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services, at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. All comments should reference Rule Project Number 2007-023-116-PR. The comment period closes September 26, 2007. For further information, please contact Michael Wilhoit, Air Permits Division, (512) 239-1222.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, that authorizes the commission to propose rules necessary to carry out its powers and duties under the Texas Water Code; TWC §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amended section is also proposed under §382.051, concerning Permitting Authority of Commission; Rules, that authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0515, concerning Application for Permit, which authorizes the commission to require a permit application with plans and specifications necessary for the commission to determine if the facility will comply with applicable state and federal regulations and the intent of the TCAA; §382.0517, concerning Determination of Administrative Completion of Application, which authorizes the commission to determine when an application is administratively complete; and §382.0518, concerning Preconstruction Permit, which requires persons planning the construction or modification of a facility to obtain a permit from the commission. The amended section is also proposed under House Bill 3732, passed by the 80th Legislature (2007) and THSC, §382.0566, Advanced Clean Energy Project Permitting Procedure, which specify certain deadlines for TCEQ's air permit review for ACEP applications.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.0515, 382.0517, 382.0518, and 382.0566 and House Bill 3732, passed by the 80th Legislature (2007).

§116.114. Application Review Schedule.

(a) Review schedule. The executive director shall review permit applications in accordance with the following.

(1) - (2) (No change.)

(3) Review schedule for Advanced Clean Energy Projects. In addition to the applicable requirements and deadlines specified in subsections (a) - (c) of this section, the following deadlines apply to permit applications for advanced clean energy projects as defined in Texas Health and Safety Code, §382.003, Definitions:

(A) As authorized by federal law, not later than nine months after the executive director declares an application for a permit under this chapter for an advanced clean energy project to be administratively complete, the executive director shall complete its technical review of the application.

(B) The commission shall issue a final order issuing or denying the permit not later than nine months after the executive director declares the application technically complete. The commission may extend this deadline up to three months if it determines that the number of complex pending applications for permits under this chapter will prevent the commission from meeting this deadline without creating an extraordinary burden on the resources of the commission.

(4) [~~(3)~~] Refund of permit fee.

(A) If the time limits provided in this section to process an application are exceeded, the applicant may appeal in writing to the executive director for a refund of the permit fee.

(B) The permit fee shall be reimbursed if it is determined by the executive director that the specified period was exceeded without good cause, as provided in Texas Civil Statutes, Article 6252-13b.1, §3.

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703865
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-0177

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CHAPTER 281. APPLICATIONS PROCESSING
SUBCHAPTER A. APPLICATIONS PROCESSING

30 TAC §281.19

The Texas Commission on Environmental Quality (TCEQ, agency or commission) proposes amendments to §281.19.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The

primary purpose of the proposed rule is to implement Senate Bill (SB) 1604, 80th Legislature, 2007, and its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)). The bill transfers responsibilities for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the Texas Department of State Health Services (department) to the commission. This proposed rulemaking intends to transfer the technical requirements for these programs from the department's rules in 25 TAC §289.254 and §289.260 into new subchapters of the commission's radioactive substantive rules in Chapter 336. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The proposed amendments to Chapter 281, Subchapter A establish the procedural requirements for the technical review of radioactive material licenses under Chapter 336. SB 1604 also establishes a new state fee for disposal of radioactive substances and amends underground injection control requirements for uranium mining. The commission intends to address the new requirements in separate rulemaking actions.

SECTION DISCUSSION

§281.19. Technical Review.

The commission proposes to amend §281.19(a) and (c) to extend the maximum period for conducting the technical review of radioactive material license applications from 450 days to 600 days and to increase the maximum number of notice of deficiencies that can be submitted by the executive director in the review of a license application from two to four. The commission believes that the longer review period and additional rounds of executive director comment on applications will greatly improve the quality of applications submitted to the agency and, thus, the quality and protectiveness of licenses issued by the commission. Applications for radioactive material licenses are complex and require the collection of a great deal of information that is unique to a proposed location. The additional time for conducting the technical review allows an applicant sufficient time to provide all required information to the executive director. The commission also proposes amendment to allow the executive director to extend or delay the schedule under this subsection to comply with the priority given to the review and processing of applications pursuant to TRCA §401.237(c) and §34(b) and (c) of SB 1604. The commission intends that the changes to this subsection apply only to applications submitted after the effective date of this rule change.

The commission proposes to add new §281.19(d) to address the applications for licenses that were pending with the department prior to transfer of agency responsibilities established under SB 1604. The applications that are pending at the department will be subjected to a maximum technical review period of 600 days at the commission with a maximum of two notices of deficiency issued by the executive director. The processing of these pending applications is subject to the priority for the review and processing of radioactive material licenses in TRCA §401.237(c) and §34(b) and (c) of SB 1604.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, fiscal implications are anticipated for the commission and the Texas Department of State Health Services (department) due to administration or enforcement of the proposed rule. No fiscal implications are anticipated for other units of state or local government.

The primary purpose of the proposed rule is to implement SB 1604, 80th Legislature, 2007. The bill transfers responsibilities for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department to the commission. This proposed rulemaking intends to transfer the technical requirements for these programs from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. Some proposed rule changes are needed for purposes of clarification or to conform to Secretary of State requirements for rule publication. The proposed amendments would establish the procedural requirements for the technical review of radioactive material licenses under Chapter 336.

SB 1604 also establishes a new state fee for disposal of radioactive substances and amends underground injection control requirements for uranium mining. The commission intends to address the new state fee and underground injection control requirements in separate rulemakings.

SB 1604 transfers regulatory authority to the TCEQ for commercial radioactive waste processing, uranium mining, and by-product disposal. The department's technical rules are being transferred to the TCEQ through this proposed rule. The legislature provided $200,000 plus the unexpended and un-obligated portions of the appropriations for the state fiscal biennium beginning September 1, 2005, made to the Health and Human Services Commission or the department for activities related to the transfer. Authority for eleven Full-Time Equivalents (FTEs) was transferred from the department to the commission.

Legislative appropriations for fiscal year 2008 and fiscal year 2009 provided that all appropriations made to the department relating to the regulation of radioactive substances, estimated to be $988,771 in fiscal year 2008 and $897,931 in fiscal year 2009 out of the General Revenue Fund, and associated Full-Time Equivalent Positions (estimated to be 11.0) were to be transferred from the department to the TCEQ. In addition to these amounts, the TCEQ was also appropriated out of the Waste Management Account Number 549 in Strategy A.2.3, Waste Management and Permitting, $471,388 in fiscal year 2008 and $460,728 in fiscal year 2009, to be used for the regulation of radioactive substances. This funding was to come from additional fee revenue the agency would be collecting for administering these new responsibilities.

The number of FTEs for the TCEQ was also increased by four in each fiscal year of the 2008-2009 biennium, for a total of 15 FTEs. The appropriations are contingent upon the agency assessing fees sufficient to generate, during the 2008-2009 biennium, revenue to cover, at a minimum, the appropriations, as well as "Other direct and indirect costs" for the program. Other direct and indirect costs are estimated to be $62,213 in each fiscal year of the 2008-2009 biennium. In the event that actual

and/or projected revenue collections are insufficient to offset the costs identified by this provision, the Legislative Budget Board may direct the Comptroller of Public Accounts to reduce the appropriation authority to be within the amount of revenue expected to be available.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and increased efficiency of the regulation of radioactive substance processing, storage and disposal through consolidation of these activities at one state agency.

No fiscal implications are anticipated for businesses and individuals as a result of the proposed rule. The proposed rulemaking intends to transfer the technical requirements for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The fees to industry and business are not changing as a result of the proposed rule. The proposed rule simply transfer the existing licensing fees from the department to the TCEQ.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are expected for small or micro-businesses as a result of the proposed rule. The proposed rulemaking intends to transfer the technical requirements for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The fees to industry and business are not changing as a result of the proposed rule. The proposed rule simply transfer the existing licensing fees from the department to the TCEQ.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission proposes the rulemaking action under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 281 are procedural, establishing the requirements for the processing of a license application. The proposed amendments to Chapter 281 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the amendments establish procedural requirements for radioactive substance disposal facilities, source material recovery facilities, or commercial radioactive substances storage and processing facilities. The proposed rulemaking action implements legislative requirements in SB 1604, transferring responsibilities for the regulation of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department to the commission. The proposed rulemaking action transfers the technical requirements for these licensing programs from the department's existing rules to the commission's rules in Chapter 336 and establishes the application processing requirements for the licenses in Chapter 281.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, the State of Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic Energy Act). The proposed rule is compatible with federal law.

The proposed rule does not exceed an express requirement of state law. The Texas Health and Safety Code, Chapter 401, establishes general requirements, for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to Texas Health and Safety Code, Chapter 401, as provided in SB 1604.

The proposed rule is compatible with a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory*

Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rule is compatible with the NRC requirements and the requirements for retaining status as an "Agreement State."

This rule is proposed under specific authority of the Texas Health and Safety Code, Chapter 401. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule. This proposed rule implements SB 1604, transferring certain regulatory responsibilities for the control of radioactive material from the department to the commission. This proposed rulemaking is reasonably taken to fulfill an obligation required by federal law for the control of radioactive material, which is an exempt action under Texas Government Code, §2007.003(b)(4).

Nevertheless, the commission further evaluated this proposed rule and performed a preliminary assessment of whether this proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The purpose of this proposed rule is to implement changes to the Texas Radiation Control Act required by SB 1604, 80th Legislature, 2007 for the processing of applications for a license for the disposal of radioactive substances, recovery of source material, and commercial radioactive substances processing and storage. The proposed rule would substantially advance this purpose by establishing the technical review period for license applications subject to the commission's jurisdiction under TRCA as amended by SB 1604.

Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. The proposed rule does not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The proposed rule establishes application processing requirements and do not affect real property. The proposed rule does not change the existing technical requirements that were in place under the department's program. Therefore, the commission's proposed rule does not affect real property in a manner that is different than may have been affected under the department's requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and determined that the proposed rule is neither identified in, nor will they affect, any action/authorization identified in Coastal Coordination Act Implementation Rules in 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the proposed rulemaking action is not subject to the CMP.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 25, 2007, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at http://www5.tceq.state.tx.us/rules/ecomments/. File size restrictions may apply to comments submitted via the eComments system. All comments should reference Rule Project Number 2007-028-336-PR. The comment period closes October 15, 2007. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Susan Jablonski, Director, Radioactive Materials Division, (512) 239-6731.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendment is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendment implements Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§281.19. Technical Review.

(a) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate. For purposes of these sections, the technical review period is that period of time beginning with the completion of the initial review period and will continue for a period of time not to exceed 75 working days. In the case of applications filed under §291.102 of this title (relating to Criteria for Considering and Granting Certificates or Amendments [~~Certificate Required~~]), the technical review period is that period of time beginning 30 days after notice of the application has been given in accordance with §291.109 of this title (relating to Report of Sale, Merger, etc.; Investigation; Disallowance of Transaction [~~Notice and Hearing for Applications for Certificates of Convenience and Necessity~~]) and will continue for a period of time not to exceed 75 working days. In the case of applications filed under §335.43 of this title (relating to Permit Required) or §331.7 of this title (relating to Permit Required), the technical review period shall commence upon assignment of the application to a staff member and continue for a period of time not to exceed 120 days. For applications filed under Chapter 336 of this title (relating to Radioactive Substance Rules) and subject to the Notice of Deficiency (NOD) process established in this section, the technical review period shall begin the day after the date of determination of administrative completeness and for issuance, renewal, or major amendments, shall continue for a period of time not to exceed 255 days; however, this time frame may be extended to a maximum of 600 [~~450~~] days if an application is technically deficient; or, for applications for minor amendments, shall continue for a period of time not to exceed 90 days; however, this time frame may be extended to a maximum of 150 days if an application is technically deficient.

(b) (No change.)

(c) For applications for radioactive material licenses, the applicant shall be promptly notified of any additional technical information necessary to complete technical review. For new applications, renewal applications, or major amendment applications, the executive director shall complete application processing within the technical review period (600 [~~450~~] days) if the applicant provides the information within 75 days of the date of the first NOD and 60 days of the subsequent NODs [~~second NOD~~]. For minor amendments, the applicant must provide the information within 20 days from the date of the first NOD and 20 days from the date of the second NOD. If the necessary additional information is not received by the executive director prior to the end of the response period, the executive director may return the application to the applicant. In no instance shall the executive director issue more than four [~~two~~] NODs before returning the application. The applicant has the option of having the question of sufficiency of necessary technical information referred to the commission for a decision instead of having the application returned. The applicant may request additional time to respond to a notice of technical deficiency. The request must be in writing, set forth the reasons why the applicant cannot respond within the time provided and specify the amount of additional time requested. Any extension of time must be approved by the executive director in writing. The executive director may extend or delay the schedule for the processing of an application under this subsection to comply with the priority established by law for processing and review of radioactive material licenses.

(d) This subsection applies to the technical review of applications for radioactive material licenses submitted to the Texas Department of State Health Services on or before June 18, 2007. For new applications, renewal applications, or major amendment applications, the executive director shall complete application processing within the technical review period (600 days) if the applicant provides the information within 75 days of the date of the first NOD and 60 days of the second NOD. For minor amendments, the applicant must provide the information within 20 days from the date of the first NOD and 20 days from the date of the second NOD. If the necessary additional information is not received by the executive director prior to the end of the response period, the executive director may return the application to the applicant. In no instance shall the executive director issue more than two NODs before returning the application. The applicant has the option of having the question of sufficiency of necessary technical information referred to the commission for a decision instead of having the application returned. The applicant may request additional time to respond to a notice of technical deficiency. The request must be in writing, set forth the reasons why the applicant cannot respond within the time provided and specify the amount of additional time requested. Any extension of time must be approved by the executive director in writing. The executive director may extend or delay the schedule for the processing of an application under this subsection to comply with the priority established by law for processing and review of radioactive material licenses.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703835
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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CHAPTER 288. WATER CONSERVATION PLANS, DROUGHT CONTINGENCY PLANS, GUIDELINES AND REQUIREMENTS

The Texas Commission on Environmental Quality (TCEQ or commission) proposes to amend §288.1 and §288.30.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

In 2007, the 80th Legislature passed Senate Bill (S.B.) 3 and House Bill (H.B.) 4. Sections 2.04, 2.06, and 2.18 of S.B. 3 and Sections 4, 6, and 8 of H.B. 4 create new Texas Water Code (TWC) provisions related to water conservation plans. Currently, the requirements relating to water conservation plans and the commission are in TWC, §11.1271. The commission's rules related to water conservation plans are in Chapter 288.

Applicants for a new or amended water right and the holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 1,000 acre-feet a year or more for municipal, industrial, and other uses, and 10,000 acre-feet a year or more for irrigation uses must submit a water conservation plan to the commission. These plans must include 5-year and 10-year targets established by the entity that submits the plan.

The new provisions passed by the legislature in 2007 include new submittal requirements for water conservation plans and that the commission provide for the enforcement of these requirements.

Section 2.04 of S.B. 3 and Section 4 of H.B. 4 amend TWC, §11.002, by adding a definition for "Best management practices."

Section 2.06 of S.B. 3 and section 6 of H.B. 4 amend TWC, Subchapter E, Chapter 13, by adding a new §13.146 that requires the commission to require retail public utilities that provide potable water service to 3,300 or more connections to submit a water conservation plan to the executive administrator of the Texas Water Development Board (Board). The plan must be based on specific targets and goals developed by the retail public utility and use appropriate best management practices.

Section 2.18 of S.B. 3 and Section 8 of H.B. 4 amend TWC, Chapter 16, by adding Subchapter K, §16.401 and §16.402, Water Conservation. This new subchapter requires the Board to implement a statewide public education awareness program; mandates that entities that are required to submit a copy of a water conservation plan to the commission to now submit a copy of the plan to the executive administrator of the Board; directs entities that are required to submit a plan to the executive administrator of the Board, the Board, or the commission to annually report on their progress to the executive administrator of the Board; allows for commission enforcement of the new provisions; and requires that the Board and commission jointly adopt rules to identify the minimum requirements and submission deadlines required by Subchapter K and to provide for enforcement.

Finally, Section 18 of H.B. 4 requires that the Board and the commission jointly adopt rules as required by TWC, §16.402(e), not later than January 1, 2008.

SECTION BY SECTION DISCUSSION

Subchapter A, Water Conservation Plans

The commission proposes to amend this subchapter to implement water conservation plan provisions of S.B. 3 and H.B. 4 from the 80th Legislature. Sections 2.04, 2.06, and 2.18 of S.B. 3 and Sections 4, 6, and 8 of H.B. 4 create new TWC provisions related to water conservation.

The commission proposes to amend §288.1, Definitions, to add a definition for "Best management practices." The definition proposed by the commission is from the definition of "Best management practices" in TWC, §11.002, as amended by S.B. 3; and H.B. 4. TWC, §13.146, as added by S.B. 3 and H.B. 4, 80th Legislature, require that water conservation plans contain appropriate best management practices as defined by TWC, §11.002. The definitions following "Best management practices" will be renumbered to accommodate the new term.

Subchapter C, Required Submittals

The commission proposes amendments to this subchapter to implement water conservation plan provisions of S.B. 3 and H.B. 4 from the 80th Legislature. Sections 2.04, 2.06, and 2.18 of S.B. 3 and Sections 4, 6, and 8 of H.B. 4 create new TWC provisions related to water conservation.

The commission proposes to amend §288.30, Required Submittals, to contain the submittal requirements that would apply to water conservation plans.

The commission proposes to amend §288.30(8) to specifically change the wording for "Other submissions" to "Additional submissions with a water right application for new or additional state water" to differentiate between the submission of water conservation plans to the commission and the additional submissions of water conservation plan submissions to the Board.

The commission proposes to add §288.30(10), Submissions to the executive administrator of the Texas Water Development Board, to contain the deadlines for water conservation and annual report submissions to the Board. This proposed new paragraph also provides for enforcement by the commission over violations of the Board's rules relating to water conservation plans and annual reports as provided by TWC, §16.402, as added by S.B. 3 and H.B. 4, 80th Legislature.

The commission proposes to add §288.30(10)(A) to require retail public water suppliers providing water service to 3,300 or more connections to submit a water conservation plan to the executive administrator of the Board no later than May 1, 2009, and every five years after that date as provided by TWC, §13.146, as added by S.B. 3 and H.B. 4, 80th Legislature.

The commission proposes to add §288.30(10)(B) to require each entity that is required to submit a water conservation plan to the commission to submit a copy of the plan to the executive administrator of the Board no later than May 1, 2009, and every five years after that date as provided by TWC, §16.402, as added by S.B. 3 and H.B. 4, 80th Legislature.

The commission proposes to add §288.30(10)(C) to mandate that each entity that is required to submit a water conservation plan to the Board or the commission also file an annual report with the Board on the entity's progress in implementing their plan not later than May 1, 2010, and annually thereafter as provided by TWC, §16.402, as added by S.B. 3 and H.B. 4, 80th Legislature.

The commission proposes to add §288.30(10)(D) to implement water conservation plan mandates of S.B. 3 and H.B. 4 to provide for enforcement by the commission over violations of the Board's rules relating to water conservation plans and annual reports as provided by TWC, §16.402, as added by S.B. 3 and H.B. 4, 80th Legislature.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules would require local governments owning or operating certain retail public utilities to submit water conservation plans to the Board and use appropriate best management practices. In addition, local governments currently required to submit water conservation plans to the agency would also be required to submit annual progress reports regarding plan implementation to the Board. Costs associated with developing and submitting water conservation plans and annual progress reports to the Board are not anticipated to be significant. Many local governments already have developed water conservation plans because such plans are considered to be part of good management practice, such plans may have been required by water supply contracts, or such plans may have been required when applying for Board loans. The Board will review the plans and report results to the appropriate levels of government. The Board has been appropriated $549,464 in general revenue funding in the 2008-2009 biennium to promote water conservation, but it is not known how much of this funding will

be spent in review, administration, and reporting associated with water conservation plans.

The proposed rules implement the sections of S.B. 3 and H.B. 4, both of which were passed in the 80th Legislature, dealing with water conservation planning. These sections, as implemented by the proposed rules, would amend the TWC and: mandate the agency to require a retail public utility providing potable water service to 3,300 or more connections to submit a water conservation plan and annual progress reports to the executive administrator of the TWDB; require any entity currently required to submit a water conservation plan to the agency under other provisions of the TWC to also submit a copy of the plan to the executive administrator of the Board; and require all entities with water conservation plans to submit an annual progress report regarding water conservation plan implementation to the executive administrator of the Board. The Board must review these plans and annual reports to determine if they comply with minimum requirements. The agency and the Board are required by the legislation and proposed rule to identify minimum requirements for water conservation plans, deadlines for annual report submission, and provide for enforcement of the proposed rules.

Currently, the agency requires water conservation plans for entities that hold water rights of 1,000 acre-feet or more per year for non-irrigation purposes and for entities that hold water rights for 10,000 acre-feet or more per year for irrigation. Staff estimates that the agency currently receives water conservation plans from 251 local governments that hold these types of water rights. These water conservation plans would continue to be submitted to the agency once every 5 years. Under the proposed rules, these water rights holders would also be required to also submit a copy of these plans to the Board along with annual progress reports regarding implementation.

Local governments currently sending the agency water conservation plans once every 5 years are not expected to incur significant costs to provide an additional copy of their plan to the Board. Nor are submissions of annual progress reports regarding implementation of the plans to the Board expected to significantly increase costs to local governments. Costs of providing copies of plans and annual reports will vary depending on the size and complexity of each document and whether they are prepared in house or by a consultant. For purposes of this fiscal note, copying costs are assumed to be 10 cents per page. Copying and mailing costs for a 200-page document could be as much as $20 and $5 to $6 respectively. This fiscal note also assumes that annual report preparation will be done in-house. If a consultant is hired for report preparation, costs could range from a few hundred dollars to several thousand dollars depending on the size of the regulated entity.

The proposed rules will also require additional retail public utilities with 3,300 or more connections to prepare water conservation plans and submit them to the Board. Additionally, annual reports will have to be submitted. Staff estimates that there may be as many as 164 additional local governments that will be sending water conservation plans to the Board that are not, and will not be, submitted to the agency. Staff believes that some of these local governments will already have water conservation plans in place; and therefore, no costs for plan development are expected to be incurred. If a local government operating a retail public utility with 3,300 or more connections does not currently have a water conservation plan, this fiscal note assumes that a water conservation plan will be developed in-house. If this is the case, plan development costs are not anticipated to be significant. If a consultant is hired, costs could range from a few hundred dollars to several thousand dollars, depending on the size of the regulated entity. Mailing costs for a 200-page water conservation plan could be as much as $5 to $6 per year. This fiscal note also assumes that annual reports will be prepared in-house with no significant costs incurred and that estimated mailing costs could be as much as $5 to $6 per year for a 200-page report.

Staff also anticipates that having water conservation plans could aid local governments subject to the proposed rules to use existing water resources more efficiently. More efficient use of existing water resources could reduce infrastructure and expansion costs as well as the need to develop or obtain additional supplies of water in the future. The amount of cost savings would vary widely depending on system size and management practices. However, any costs of water conservation planning and annual reporting are expected to be more than offset by these types of savings.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that, for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be better conservation and more efficient use of state groundwater and surface water.

Staff estimates that there may be as many as 24 non-profit organizations or large businesses that are already required to submit water conservation plans once every 5 years to the agency and that will have to provide an additional copy of the plan and an annual report to the Board under the proposed rules. Staff also estimates that there may be as many as 11 additional non-profit or business-owned retail public utilities with 3,300 or more connections not currently required to submit such plans that will be required under the proposed rules to provide water conservation plans and annual reports to the Board. These 11 retail public utilities may already have developed water conservation plans because such plans are considered to be good management practice, such plans may have been required by water supply contracts, or such plans may have been required when applying for Board loans. If such a plan has not been developed, this fiscal note assumes that the plan will be developed in-house and development costs will be minimal. This fiscal note also assumes that annual reports will be prepared in-house. Therefore, plan and report preparation costs are not anticipated to be significant. Copying and postage costs are expected to be minimal and in the same range as those incurred by local governments. If a consultant is hired, costs could range from a few hundred dollars to several thousand dollars, depending on the size of the regulated entity. Staff also anticipates that having water conservation plans could aid the retail public utilities to use existing water resources more efficiently. More efficient use of existing water resources could reduce infrastructure and expansion costs as well as the need to develop or obtain additional supplies of water in the future. The amount of cost savings would vary widely depending on system size and management practices. However, any costs of water conservation planning and annual reporting are expected to be more than offset by these types of savings.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Staff estimates that there may be as many as 2 small businesses and 2 micro-businesses not already required to submit water conserva-

tion plans to the agency that will be required to submit plans and reports to the Board. This fiscal note assumes that these plans and reports will be prepared in-house without incurring additional out of pocket costs. It is estimated that as many as 28 small businesses and 5 micro-businesses that submit water conservation plans to the agency will be required, under the proposed rules, to provide copies of those plans and annual progress reports to the Board. Copying costs are estimated to be 10 cents per page. For a 200-page document, copying could be as much as $20 and postage costs could be as much as $5 to $6. Any preparation, copying, or postage cost increases are expected to be more than offset by savings associated with more efficient use of existing water resources and infrastructure.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedures Act. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The specific intent of the proposed rule is to implement water conservation provisions enacted in S.B. 3 and H.B. 4, 80th Legislature. Generally, the intent of these proposed water conservation provisions is to protect the environment and benefit the waters of the state, thus furthering the state's policy of maintaining the biological soundness of the state's rivers, lakes, bays, and estuaries.

The proposed rulemaking is not a "major environmental rule" because the proposed rules will not "adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state" because the rules are intended to conserve water for environmental reasons and for future beneficial uses. It is not anticipated that the cost of complying with the proposed amendments will be significant with respect to the economy as a whole; therefore, the proposed amendments will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

This proposed rulemaking does not qualify as a major environmental rule because it will not have an adverse economic effect. Additionally, this rulemaking does not meet the definition of a major environmental rule because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This proposed rulemaking does not meet any of these four applicability requirements because the proposed rules: (1) are specifically required by state law, namely the TWC, and do not exceed a standard set by federal law; (2) do not exceed the express requirements of the TWC; (3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) the proposed rules will not be adopted solely under the general powers of the commission.

Based on the foregoing, the proposed rulemaking does not constitute a major environmental rule, and thus is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed amendments to Chapter 288 and performed an analysis of whether these amendments constitute a taking under Texas Government Code, Chapter 2007. The intent of the proposed rule amendments is to implement water conservation provisions enacted in S.B. 3 and H.B. 4, 80th Legislature.

The proposed rule amendments would substantially advance the intent of the rulemaking by setting forth a definition of "Best management practices" and requiring the submission of water conservation plans and annual reports on the implementation of water conservation measures to the commission and the executive administrator of the Board.

Promulgation and enforcement of these proposed rule amendments will constitute neither a statutory nor a constitutional taking of private real property. The proposed regulations do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this proposed rulemaking does not burden nor restrict or limit the owner's right to property. More specifically, these rule proposals implement water conservation measures and reporting requirements which do not impose any burdens or restrictions on private real property. Therefore, the proposed amendments do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §33.201 *et. seq.*, and, therefore, must be consistent with all applicable CMP goals and policies.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is administrative in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments submitted via the eComments system. All comments should reference Rule Project Number 2007-025-288-PR. The comment period closes October 9, 2007. Copies of the proposed rule amendments can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Bill Billingsley, Water Supply Division, at (512) 239-1697.

SUBCHAPTER A. WATER CONSERVATION PLANS

30 TAC §288.1

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.102, which provides the commission the general powers to carry out duties under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. Finally, TWC, §16.402(e), requires that the Board and the commission jointly adopt rules implementing provisions of S.B. 3 and H.B. 4 from the 80th Legislature.

The proposed amendment implements TWC, §11.002 and §16.402.

§288.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (2) (No change.)

(3) Best management practices--Voluntary efficiency measures that save a quantifiable amount of water, either directly or indirectly, and that can be implemented within a specific time frame.

(4) [~~(3)~~] Conservation--Those practices, techniques, and technologies that reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(5) [~~(4)~~] Drought contingency plan--A strategy or combination of strategies for temporary supply and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies. A drought contingency plan may be a separate document identified as such or may be contained within another water management document(s).

(6) [~~(5)~~] Industrial use--The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, commercial fish production, and the development of power by means other than hydroelectric, but does not include agricultural use.

(7) [~~(6)~~] Irrigation--The agricultural use of water for the irrigation of crops, trees, and pastureland, including, but not limited to, golf courses and parks which do not receive water through a municipal distribution system.

(8) [~~(7)~~] Irrigation water use efficiency--The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include, but are not limited to, evapotranspiration needs for vegetative maintenance and growth, salinity management, and leaching requirements associated with irrigation.

(9) [~~(8)~~] Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(10) [~~(9)~~] Municipal per capita water use--The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(11) [~~(10)~~] Municipal use--The use of potable water within or outside a municipality and its environs whether supplied by a person, privately owned utility, political subdivision, or other entity as well as the use of sewage effluent for certain purposes, including the use of treated water for domestic purposes, fighting fires, sprinkling streets, flushing sewers and drains, watering parks and parkways, and recreational purposes, including public and private swimming pools, the use of potable water in industrial and commercial enterprises supplied by a municipal distribution system without special construction to meet its demands, and for the watering of lawns and family gardens.

(12) [~~(11)~~] Municipal use in gallons per capita per day--The total average daily amount of water diverted or pumped for treatment for potable use by a public water supply system. The calculation is made by dividing the water diverted or pumped for treatment for potable use by population served. Indirect reuse volumes shall be credited against total diversion volumes for the purpose of calculating gallons per capita per day for targets and goals.

(13) [~~(12)~~] Nursery grower--A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease, and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(14) [~~(13)~~] Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(15) [~~(14)~~] Public water supplier--An individual or entity that supplies water to the public for human consumption.

(16) [~~(15)~~] Regional water planning group--A group established by the Texas Water Development Board to prepare a regional water plan under Texas Water Code, §16.053.

(17) [~~(16)~~] Retail public water supplier--An individual or entity that for compensation supplies water to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants when that water is not resold to or used by others.

(18) [~~(17)~~] Reuse--The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(19) [~~(18)~~] Water conservation plan--A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate document identified as such or may be contained within another water management document(s).

(20) [~~(19)~~] Wholesale public water supplier--An individual or entity that for compensation supplies water to another for resale to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants as an incident of that employee service or tenancy when that water is not resold to or used by others, or an individual or entity that conveys water to another individual or entity, but does not own the right to the water which is conveyed, whether or not for a delivery fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703847
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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SUBCHAPTER C. REQUIRED SUBMITTALS

30 TAC §288.30

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.102, which provides the commission the general powers to carry out duties under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041, states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in Chapter 13 of the TWC or implied in Chapter 13 of the TWC, necessary and convenient to the exercise of this power and jurisdiction. Finally, TWC, §16.402(e), requires that the board and the commission jointly adopt rules implementing provisions of House Bill 4 and Senate Bill 3 from the 80th Legislature.

The proposed amendment implements TWC, §13.146 and §16.402.

§288.30. Required Submittals.

In addition to the water conservation and drought contingency plans required to be submitted with an application under §295.9 of this title (relating to Water Conservation and Drought Contingency Plans), water conservation and drought contingency plans are required as follows.

(1) - (7) (No change.)

(8) Additional [~~Other~~] submissions with a water right application for new or additional state water. A water conservation plan or drought contingency plan required to be submitted with an application in accordance with §295.9 of this title must also be subject to review and approval by the commission.

(9) (No change.)

(10) Submissions to the executive administrator of the Texas Water Development Board.

(A) Water conservation plans for retail public water suppliers. For retail public water suppliers providing water service to 3,300 or more connections, a water conservation plan meeting the minimum requirements of Subchapter A of this chapter must be developed, implemented, and submitted to the executive administrator of the Texas Water Development Board not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group. Any revised plans must be submitted to the executive administrator within 90 days of adoption by the community water system. Any new retail public water suppliers providing water service to 3,300 or more connections shall prepare and adopt a water conservation plan within 180 days of commencement of operation, and submit the plan to the executive administrator of the Texas Water Development Board within 90 days of adoption.

(B) Water conservation plans. Each entity that is required to submit a water conservation plan to the commission shall submit a copy of the plan to the executive administrator of the Texas Water Development Board not later than May 1, 2009, and every five years after that date to coincide with the regional water planning group.

(C) Annual reports. Each entity that is required to submit a water conservation plan to the Texas Water Development Board or the commission, shall file a report not later than May 1, 2010, and annually thereafter to the executive administrator of the Texas Water Development Board on the entity's progress in implementing the plan.

(D) Violations of the Texas Water Development Board's rules. The commission has enforcement authority over violations of the Texas Water Development Board's rules relating to water conservation plans and annual reports. The water conservation plans and annual reports shall comply with the minimum requirements established in the Texas Water Development Board's rules. The Texas Water Development Board may notify the commission if the Texas Water Development Board determines that an entity has not complied with the minimum requirements established in the Texas Water Development Board's rules relating to water conservation plans and annual reports.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703846
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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CHAPTER 336. RADIOACTIVE SUBSTANCE RULES

The Texas Commission on Environmental Quality (TCEQ, agency or commission) proposes amendments to §§336.1, 336.5, 336.105, 336.201, 336.203, 336.207, 336.211, 336.213, 336.601, 336.613, and 336.619. The commission also proposes new §§336.1101, 336.1103, 336.1105, 336.1107, 336.1109, 336.1111, 336.1113, 336.1115, 336.1117, 336.1119, 336.1121, 336.1123, 336.1125, 336.1127, 336.1129, 336.1131, 336.1133, 336.1135, 336.1201, 336.1203, 336.1205, 336.1207, 336.1209, 336.1211, 336.1213, 336.1215, 336.1217, 336.1219, 336.1221, 336.1223, 336.1225, 336.1227, 336.1229, 336.1231, 336.1233, 336.1235 and the repeal of §336.11.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The changes proposed to this chapter are part of a larger proposal to revise the commission's radiation control rules. The primary purpose of the proposed rules is to implement Senate Bill (SB) 1604, 80th Legislature, 2007, and its amendments to Texas Health and Safety Code (THSC), Chapter 401 (also known as the Texas Radiation Control Act (TRCA)). The bill transfers responsibilities for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the Texas Department of State Health Services (department) to the commission. This proposed rulemaking intends to transfer the technical requirements for these programs from the department's rules in 25 TAC §289.254 and §289.260 into new subchapters of the commission's radioactive substantive rules in Chapter 336. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. Some proposed rule changes are needed for purposes of clarification or to conform to Secretary of State requirements for rule publication. SB 1604 also establishes a new state fee for disposal of radioactive substances and amends underground injection control requirements for uranium mining. The commission intends to address the new state fee and underground injection control requirements in separate rulemakings.

SECTION BY SECTION DISCUSSION

Subchapter A. General Provisions

336.1. Scope and General Provisions.

Section 336.1(a) is proposed to be amended to reflect the new commission responsibilities under SB 1604 for the regulation and licensing of source material recovery, by-product disposal, and the commercial storage and processing of radioactive substances. Section 336.1(f) is proposed to be amended to prohibit source material recovery, by-product disposal, and the commercial storage and processing of radioactive substances unless the person is licensed or exempted by the commission.

§336.5. Exemptions.

Section 336.5(c) is proposed to be amended to reflect amendments to THSC, §401.106(a) under SB 1604 to provide the commission authority to exempt by rule a source of radiation or a kind of use or user from the licensing or registration requirements provided by Chapter 401 if the commission finds that the exemption of the source of radiation or kind of use or user will not constitute a significant risk to the public health and safety and the environment. Prior to SB 1604, only the department had authority to exempt a source of radiation or a kind of use or user from licensing requirements provided by Chapter 401. Section 336.5(d) is proposed to be amended to recognize any of the department's exemptions that were issued prior to the effective date of SB 1604. The commission may modify the exemptions from the statutory requirements in future rulemaking according to the requirements of THSC, §401.106(a). The commission also retains the process for exempting a source of radiation or a kind of use or user from the application of a rule in Chapter 336 under §336.5(a).

§336.11. Memorandum of Understanding With the Texas Department of Health Regarding Radiation Control Functions.

Section 336.11 is proposed to be repealed. Because of the changes in jurisdictional responsibilities established in SB 1604, the provisions of The Memorandum of Understanding (MOU) between the Texas Department of Health and the Texas Natural Resource Conservation Commission Regarding Radiation Control Functions no longer reflect current law. The commission intends to work with the department to revise the MOU and propose it in a future rulemaking.

Subchapter B. Radioactive Substance Fees

§336.105. Schedule of Fees for Other Licenses.

Section 336.105 is proposed to be amended to reflect the new commission responsibilities under SB 1604 for the regulation and licensing of source material recovery, by-product disposal, and the commercial storage and processing of radioactive substances. Licenses for source material recovery and by-product disposal will be subject to the requirements of new Subchapter L. Licenses for commercial radioactive substances processing and disposal will be subject to the requirements of new Subchapter M. Application fees and licensing fees for these activities are established in the schedule provided in §336.105. Under §336.105(a)(4), the commission proposes application fees of $463,096 for conventional mining, $322,633 for in situ mining, $325,910 for heap leach, and $374,729 for disposal only for license applications received under Subchapter L for source material recovery and by-product disposal. Under §336.105(a)(5), the commission proposes an application fee of $3,830 for Waste Processing - Class I Exempt; $39,959 for Waste Processing - Class I; $94,661 for Waste Processing - Class II; and $273,800 for Waste Processing - Class III for license applications received under Subchapter M for commercial radioactive substances storage and processing. Licensed facilities are also subject to an annual licensing fee established under §336.105(b) which under Subchapter M §336.105(b)(5) are the same fees as indicated for application fees in §336.105(a)(5). Under §336.105(b)(4), the commission proposes an annual licensing fee for operational facilities of $60,929.50 for licenses issued under Subchapter L for source material recovery and by-product disposal. There are additional multipliers and one-time fees related to licenses issued under Subchapter L for source material recovery and by-product disposal also established in §336.105(b). Subsection (f) is proposed to be amended to reflect that under the provisions of SB 1604, the commission may assess and collect additional fees from the applicant to recover costs for an application to dispose of by-product material that was filed with the department on or before January 1, 2007. The commission recognizes that existing licensees were subject to a biennial licensing fee at the department. While the commission intends to establish a schedule for the payment of an annual licensing fee for both new and existing licensees, the commission does not expect a licensee to pay

twice for coverage of the same year. Subsection (g) is proposed to be amended to allow licensees which remitted a biennial fee to the department to remit the annual fee to the commission upon the expiration of the second year of coverage of the biennial fee.

Subchapter C. General Disposal Requirements

The commission proposes to amend the title of Subchapter C by changing the name from "General Disposal Requirements" to "General Licensing Requirements." Prior to SB 1604, the commission had responsibilities under TRCA only for certain disposal activities. SB 1604 provides the TCEQ with additional regulatory and licensing responsibilities for source material recovery and commercial radioactive substances storage and processing. Subchapter C contains general provisions applicable to all licensing programs.

§336.201. Purpose and Scope.

The commission proposes to amend §336.201 to reflect the statutory changes in SB 1604 that provide the commission authority to regulate the disposal of by-product material.

§336.203. License Required.

The commission proposes to amend §336.203 to reflect the statutory changes in SB 1604 that provide the commission authority to establish exemptions under THSC, §401.106(a).

§336.207. General Requirements for Issuance of a License.

The commission proposes to amend §336.207(1) by removing the word "disposal" to reflect that the commission regulates radioactive material activities in addition to disposal. The commission proposes to amend paragraph (4) to specify that the paragraph only applies to applications for a license under Subchapter H of Chapter 336 for commercial disposal of low-level radioactive waste.

§336.211. General Requirements for Radioactive Material Disposal.

The commission proposes to amend §336.211(a) to reflect that a licensee may dispose of licensed material at a facility licensed under Subchapter L for the disposal of by-product material. The commission proposes to amend §336.211(c) to reflect the change in regulatory responsibilities in SB 1604 for the commission's regulation and licensing of commercial radioactive substances processing and storage. The commission proposes to amend §336.211(d) to provide that the receipt, storage and/or processing at a licensed disposal facility for the explicit purpose of disposal must be regulated in accordance with the license authorizing disposal.

§336.213. Method of Obtaining Approval of Proposed Disposal Activities.

The commission proposes to amend the title of this section by removing "disposal" to reflect that the commission's licensing authority under Chapter 336 includes activities in addition to disposal. The commission proposes to amend §336.213(a) to provide that persons who intend to store or process radioactive substances from other persons or recover, mine, or process source material shall submit an application according to Chapter 305 of this title (relating to Consolidated Permits).

Subchapter G. Decommissioning Standards

The commission proposes to amend Subchapter G to establish decommissioning standards for ancillary facilities at source material recovery or by-product disposal facilities licensed under new Subchapter L (relating to Licensing of Uranium Recovery and By-product Material Disposal Facilities) and decommissioning standards for radioactive substances storage and processing facilities licensed under new Subchapter M (relating to Licensing of Radioactive Substances Processing and Storage Facilities.) Decommissioning requirements and financial assurance for decommissioning of storage and processing facilities will be required under Subchapter G in addition to the requirements of Subchapter M.

§336.601. Applicability.

The commission proposes to amend §336.601 to apply the standards of Subchapter G to the decommissioning standards for ancillary facilities of source material recovery and by-product disposal and to the decommissioning of radioactive substance storage and processing facilities. Financial assurance requirements for radioactive substance storage and processing facilities will be determined under the requirements of Subchapter G, and the specific financial assurance provisions of Subchapter T of Chapter 37.

§336.613. Additional Requirements.

The commission proposes to amend §336.613(b) to include a reference to new §336.1211 so that applications for licenses authorizing the commercial storage and processing of radioactive substances under Subchapter M of Chapter 336 include a decommissioning plan under the requirements of Subchapter G of Chapter 336.

§336.619. Financial Assurance for Decommissioning.

The commission proposes to amend §336.619(b) to include references to Subchapters K, L, and M of Chapter 336 so that financial assurance is provided for decommissioning activities in the amount of the cost estimates provided in the decommissioning plan. The commission proposes amendment to §336.619(c) to clarify that the decommissioning funding plan provided in the subsection only applies to inactive disposal sites licensed before January 1, 1998, and does not apply to new or existing licenses issued under Subchapters K, L, and M of Chapter 336.

Subchapter L. Licensing of Uranium Recovery and By-product Material Disposal Facilities

The commission proposes to create a new Subchapter L in Chapter 336 for the licensing of Uranium Recovery and By-product Material Disposal Facilities. The commission intends to transfer the technical requirements from the department's rules in 25 TAC §289.260 on uranium recovery and by-product disposal, format the rule into sections, and add clarification as appropriate. The commission intends to integrate the new Subchapter L licensing program into the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. Therefore, references in 25 TAC §289.260 to the department's procedural requirements are replaced with the appropriate reference to the commission's procedures.

§336.1101. Purpose.

The commission proposes to create new §336.1101 to establish the purpose of Subchapter L, implementing the department's provisions in 25 TAC §289.260(a).

§336.1103. Scope.

The commission proposes to create new §336.1103 to establish the scope of the requirements of Subchapter L, implementing the department's provisions in 25 TAC §289.260(b). Subchapter L licensees are subject to Subchapters A-E and G, as applicable.

§336.1105. Definitions.

The commission proposes to create new §336.1105 to establish definitions for Subchapter L, implementing the department's provisions in 25 TAC §289.260(c). The definition of "Security" is modified to reflect that the term has the same meaning as "financial assurance."

§336.1107. Filing Application for Specific Licenses.

The commission proposes to create new §336.1107 to establish application requirements for a Subchapter L license, implementing the department's provisions in 25 TAC §289.260(d). An application for a license under Subchapter L is subject to the commission's license application requirements in §336.205 (relating to application requirements).

§336.1109. General Requirements for the Issuance of Specific Licenses.

The commission proposes to create new §336.1109 to establish general requirements for the issuance of specific licenses, implementing the department's provisions in 25 TAC §289.260(e). The commission proposes to revise the qualifications for the radiation safety officer to reflect recommendations from the Nuclear Regulatory Commission for minimum education and experience required for a radiation safety officer at a uranium recovery or by-product material disposal facility, and these new requirements are consistent with the practice of the department.

§336.1111. Special Requirements for a License Application for Uranium Recovery and By-product Material Disposal Facilities.

The commission proposes to create new §336.1111 to establish special requirements for a license application for uranium recovery and by-product material disposal facilities, implementing the department's provisions in 25 TAC §289.260(f). In addition, the commission proposes §336.1111(1)(G) to include the department's application requirement in 25 TAC §289.252(e)(7) for the submission of an operating, safety, and emergency procedures manual. The commission also proposes §336.1211(1)(H) to include the department's application requirement in 25 TAC §289.252(e)(9) for landowner acknowledgment of licensed activities and the landowner's recognition that decommissioning may be required even if the licensee is unable or fails to perform required decommissioning. The commission proposes to add provisions in §336.1111(b) to allow certain construction activities prior to the issuance of a license, implementing Section 33(l) of SB 1604. Under Section 33(l) of SB 1604 the applicant for a by-product disposal license that was filed with the department prior to January 1, 2007, may begin major construction related to the activities for which the license application was made at the time technical review has been made and an environmental analysis is prepared at its own risk and to the extent that such construction is not prohibited under federal law.

§336.1113. Specific Terms and Conditions of Licenses.

The commission proposes to create new §336.1113 to establish specific terms and conditions of licenses, implementing the department's provisions in 25 TAC §289.260(g). The commission proposes to add a reference in §336.1113(c) to the commission's spill rules in Chapter 329. The reporting and response to spills of radioactive materials are covered under Chapter 336. Spills of non-radioactive materials are subject to the additional requirements of the Chapter 329. The commission proposes to add subsections (g) through (j) to add standard terms to a license issued under Subchapter L. These new standard license provisions are similar to standard terms in all TCEQ issued permits and are similar to the license terms for commercial low-level radioactive disposal and NORM disposal licenses issued under Subchapters H and K of Chapter 336.

§336.1115. Expiration and Termination of Licenses; Decomissioning of Sites, Separate Buildings or Outdoor Areas.

The commission proposes to create new §336.1115 to establish requirements for the expiration and termination of licenses and for the decommissioning of sites, separate buildings or outdoor areas, implementing the department's provisions in 25 TAC §289.260(h). The commission proposes new §336.1115(a) to establish that licenses issued under Subchapter L may be issued for a term not to exceed ten years. The licenses issued by the department were subject to a two year term. The department's requirements distinguished a two year administrative renewal from a ten year technical renewal. Rather than implement both of these types of renewals, the commission proposes a ten year license term. The expiration of a license does not relieve the licensee from the requirements of Chapter 336, including financial assurance and decommissioning obligations. In addition, the commission proposes to implement application and annual fees in Subchapter B.

§336.1117. Renewal of Licenses.

The commission proposes to create a new §336.1117 to establish requirements for the renewal of a license issued under Subchapter L, implementing the department's provisions in 25 TAC §289.260(i). The department's rules include provisions for both a two year administrative renewal and a ten year technical renewal. Rather than implement both of these types of renewals, the commission proposes a ten-year renewal term.

§336.1119. Amendment of Licenses at Request of Licensee.

The commission proposes to create a new §336.1119 to establish requirements for amendment applications for a license issued under Subchapter L, implementing the department's provisions in 25 TAC §289.260(j).

§336.1121. Agency Action of Applications to Renew or Amend.

The commission proposes to create a new §336.1121 to establish requirements for considering applications to amend or renew licenses issued under Subchapter L, implementing the department's provisions in 25 TAC §289.260(k).

§336.1123. Transfer of Material.

The commission proposes to create a new §336.1123 to establish requirements for transferring radioactive materials, implementing the department's provisions in 25 TAC §289.260(l).

§336.1125. Financial Security Requirements.

The commission proposes to create a new §336.1125 to establish requirements for financial security, implementing the department's provisions in 25 TAC §289.260(m). The commission proposes new subsection (g) to provide that financial assurance mechanisms submitted to comply with the requirements of Subchapter L must meet the requirements of Chapter 37, Subchapter T of this title. The commission's financial assurance requirements are consolidated in Chapter 37 and establish specific requirements for the type of financial assurance mechanisms and

the wording for specific financial assurance instruments. New subsection (j) is proposed to provide that existing licensees must submit new financial assurance mechanisms to comply with the requirements of Subchapter L and the requirements of Chapter 37, Subchapter T by June 1, 2008. The commission believes that this provides a suitable amount of time for licensees to make arrangements for submission of financial assurance mechanisms that are in compliance with commission requirements.

§336.1127. Long-term Care and Maintenance Requirements.

The commission proposes new §336.1127 to establish requirements for long-term care and maintenance of facilities licensed under Subchapter L, implementing the department's provisions in 25 TAC §289.260(n). In subsection (c), the commission does propose to change the assumed real interest rate from 1% to 2%, consistent with the assumed real interest rate, above inflation, of 2%, used for the funding for institutional control for the low-level radioactive waste disposal license in Subchapter H.

§336.1129. Technical Requirements.

The commission proposes new §336.1129 to establish technical requirements for facilities licensed under Subchapter L, implementing the department's provisions in 25 TAC §289.260(o).

§336.1131. Land Ownership of By-product Material Disposal Sites.

The commission proposes new §336.1131 to establish requirements for land ownership of by-product material disposal sites, implementing the department's provisions in 25 TAC §289.260(p).

§336.1133. Maximum Values for Use in Groundwater Protection.

The commission proposes new §336.1133 to establish values for concentrations of certain constituents for use in groundwater protection, implementing the department's provisions in 25 TAC §289.260(q).

§336.1135. Construction Activities.

The commission proposes new §336.1135 to establish requirements for construction activities that may occur at a proposed facility before a license is issued under Subchapter L, implementing Section 33(l) of SB 1604.

Subchapter M. Licensing of Radioactive Substances Processing and Storage Facilities

The commission proposes to create a new Subchapter M in Chapter 336 for the licensing of Radioactive Substances Processing and Storage Facilities. The commission intends to transfer the technical requirements from the department's rules in 25 TAC §289.254 for commercial storage and processing, format the rule into sections, and add clarification as appropriate. The commission intends to integrate the new Subchapter M licensing program into the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. Therefore, references in 25 TAC §289.254 to the department's procedural requirements are replaced with the appropriate reference to the commission's procedures. Throughout the subchapter, the term "radioactive substance" has been substituted for "radioactive waste" to reflect the definition of radioactive substance provided in TRCA.

§336.1201. Purpose and Scope.

The commission proposes to create new §336.1201 to establish the purpose and scope of the requirements of Subchapter M for commercial radioactive substances storage and processing, implementing the department's provisions in 25 TAC §289.254(a).

§336.1203. Definitions.

The commission proposes to create new §336.1203 to establish definitions for Subchapter M, implementing the department's provisions in 25 TAC §289.254(b).

§336.1205. Activities Requiring License.

The commission proposes to create new §336.1205 to establish that a license or exemption under Subchapter M is required before a person may receive, possess, store, or process radioactive substances from other persons.

§336.1207. Radioactive substances processing and storage facility classification.

The commission proposes to create new §336.1207 to establish classifications for radioactive substances processing and storage facilities, implementing the department's provisions in 25 TAC §289.254(d).

§336.1209. Exemptions.

The commission proposes to create new §336.1209 to establish exemptions for radioactive substances processing and storage, implementing the department's provisions in 25 TAC §289.254(e).

§336.1211. Filing Application for a Specific License.

The commission proposes to create new §336.1211 to establish requirements for the submission of an application for a license under Subchapter M, implementing the department's provisions in 25 TAC §289.254(f). In addition, the commission proposes §336.1211(4)(T) to include the department's application requirement in 25 TAC §289.252(e)(7) for the submission of an operating, radiation safety, and emergency procedures manual. The commission also proposes §336.1211(4)(U) to include the department's application requirement in 25 TAC §289.252(e)(9) for landowner acknowledgment of licensed activities and the landowner's recognition that decommissioning may be required even if the licensee is unable or fails to perform required decommissioning.

§336.1213. Additional Environmental Requirements for Class III Facilities.

The commission proposes to create new §336.1213 to establish additional requirements for a Class III facility, implementing the department's provisions in 25 TAC §289.254(g).

§336.1215. Issuance of Licenses.

The commission proposes to create new §336.1215 to establish requirements for the issuance of a license under Subchapter M, implementing the department's provisions in 25 TAC §289.254(h). The commission also proposes to add the minimum qualifications for the radiation safety officer required for radioactive substances storage and processing facilities which are consistent with the practice of the department for approving radiation safety officer designations at licensed facilities.

§336.1217. Commencement of Major Construction.

The commission proposes to create new §336.1217 to prohibit major construction until a license has been issued by the commission. License applications under Subchapter M are not sub-

ject to the pre-licensing construction authorization provided in Section 33(l) of SB 1604.

§336.1219. Commencement of Operations.

The commission proposes to create new §336.1219 to prohibit operations until a license has been issued and the licensee has obtained all licenses or permits required from other agencies, implementing the department's provisions in 25 TAC §289.254(j).

§336.1221. Specific Terms and Conditions of Licenses.

The commission proposes to create new §336.1221 to establish specific license terms and conditions for a license issued under Subchapter M, implementing the department's provisions in 25 TAC §289.254(k). The commission also proposes §336.1221(9) and (10) to establish the specific license terms required by the department's provisions in 25 TAC §289.252(w)(2) and (x)(3).

§336.1223. Renewal of Licenses.

The commission proposes to create new §336.1223 to establish requirements for the renewal of a license under Subchapter M, implementing the department's provisions in 25 TAC §289.254(l). The department's licensing program distinguished a two year administrative renewal from a ten year technical renewal. Rather than implement both of these types of renewals, the commission proposes a ten year license period.

§336.1225. Amendment of License at Request of Licensee.

The commission proposes to create new §336.1225 to establish requirements for amendment of licenses under Subchapter M, implementing the department's provisions in 25 TAC §289.254(m).

§336.1227. Radioactive Substances Processing and Packaging Requirements.

The commission proposes to create new §336.1227 to establish requirements for radioactive substances processing and packaging, implementing the department's provisions in 25 TAC §289.254(n).

§336.1229. Environmental Assessment.

The commission proposes to create new §336.1229 to establish requirements for an environmental assessment for a license under Subchapter M, implementing the department's provisions in 25 TAC §289.254(o).

§336.1231. Radioactive Substances Processing and Storage Categories of Radionuclides.

The commission proposes to create new §336.1231 to establish categories of radionuclides for radioactive substances and processing under Subchapter M, implementing the department's provisions in 25 TAC §289.254(p).

§336.1233. Radiation Safety Committee.

The commission proposes to create new §336.1233 to establish requirements for a radiation safety committee, implementing the department's provisions in 25 TAC §289.252(g).

§336.1235. Financial Assurance for Storage and Processing.

The commission proposes to create new §336.1235 to establish financial assurance requirements for facilities licensed under Subchapter M. Decommissioning and financial assurance for facilities licensed under Subchapter M is required under the provisions of Subchapter G of Chapter 336. Financial assurance instruments must be provided in accordance with Subchapter T of Chapter 37 of the commission rules. New licenses must provide acceptable financial assurance 60 days prior to receipt or possession of radioactive substances. Existing licensees authorized by the department must submit new financial assurance mechanisms in favor or the commission by June 1, 2008. In addition, once financial assurance is established, a licensee must provide a cost estimate report annually to allow review of cost estimates for decommissioning and submit additional financial assurance to reflect any increase in the cost estimate.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for the commission and the Texas Department of State Health Services (department) due to administration or enforcement of the proposed rules. No fiscal implications are anticipated for other units of state or local government.

The primary purpose of the proposed rules is to implement SB 1604, 80th Legislature, 2007. The bill transfers responsibilities for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department to the commission. This proposed rulemaking intends to transfer the technical requirements for these programs from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. Some proposed rule changes are needed for purposes of clarification or to conform to Secretary of State requirements for rule publication. The proposed amendments would establish the technical requirements for the radioactive material licenses under Chapter 336, as well as public notice requirements, financial assurance requirements, and application processing requirements for radioactive material licenses under Chapters 37, 39, and 281.

SB 1604 also establishes a new state fee for disposal of radioactive substances and amends underground injection control requirements for uranium mining. The commission intends to address the new state fee and underground injection control requirements in separate rulemakings.

SB 1604 transfers regulatory authority to the TCEQ for commercial radioactive waste processing, uranium mining, and by-product disposal. The department's technical rules are being transferred to the TCEQ through these proposed rules. The legislature provided $200,000 plus the unexpended and un-obligated portions of the appropriations for the state fiscal biennium beginning September 1, 2005, made to the Health and Human Services Commission or the department for activities related to the transfer. Authority for eleven Full-Time Equivalents (FTEs) was transferred from the department to the commission.

Legislative appropriations for fiscal year 2008 and fiscal year 2009 provided that all appropriations made to the department relating to the regulation of radioactive substances, estimated to be $988,771 in fiscal year 2008 and $897,931 in fiscal year 2009 out of the General Revenue Fund, and associated Full-Time Equivalent Positions (estimated to be 11.0) were to be transferred from the department to the TCEQ. In addition to these amounts, the

TCEQ was also appropriated out of the Waste Management Account Number 549 in Strategy A.2.3, Waste Management and Permitting, $471,388 in fiscal year 2008 and $460,728 in fiscal year 2009, to be used for the regulation of radioactive substances. This funding was to come from additional fee revenue the agency would be collecting for administering these new responsibilities.

The number of FTEs for the TCEQ was also increased by four in each fiscal year of the 2008-2009 biennium, for a total of 15 FTEs. The appropriations are contingent upon the agency assessing fees sufficient to generate, during the 2008-2009 biennium, revenue to cover, at a minimum, the appropriations, as well as "Other direct and indirect costs" for the program. Other direct and indirect costs are estimated to be $62,213 in each fiscal year of the 2008-2009 biennium. In the event that actual and/or projected revenue collections are insufficient to offset the costs identified by this provision, the Legislative Budget Board may direct the Comptroller of Public Accounts to reduce the appropriation authority to be within the amount of revenue expected to be available.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and increased efficiency of the regulation of radioactive substance processing, storage and disposal through consolidation of these activities at one state agency.

No fiscal implications are anticipated for businesses and individuals as a result of the proposed rules. The proposed rulemaking intends to transfer the technical requirements for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The fees to industry and business are not changing as a result of the proposed rules. The proposed rules simply transfer the existing licensing fees from the department to the TCEQ.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are expected for small or micro-businesses as a result of the proposed rules. The proposed rulemaking intends to transfer the technical requirements for the regulation and licensing of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department's rules into new subchapters of the commission's radioactive substantive rules. While the technical requirements remain the same, these new commission programs will be integrated into and administered under the commission's existing radioactive material program requirements for application processing, public notice, public participation, licensing fees, financial assurance, and enforcement. The fees to industry and business are not changing as a result of the proposed rules. The proposed rules simply transfer the existing licensing fees from the department to the TCEQ.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 336 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because there are no significant requirements added to radioactive substance disposal facilities, source material recovery facilities, or commercial radioactive substances storage and processing facilities. The proposed rulemaking action implements legislative requirements in SB 1604, transferring responsibilities for the regulation of source material recovery, by-product disposal, and commercial radioactive substances storage and processing from the department to the commission. The proposed rulemaking in Chapter 336 transfers the technical requirements for these licensing programs from the department's existing rules to the commission's rules. The proposed rulemaking also integrates the transferring license programs into existing commission procedural requirements in Chapters 39 and 281 and establishes financial assurance requirements in Chapter 37. The proposed rules make appropriate formatting changes, clarifications and updates to the rules to reflect requirements of the Secretary of State for rule publication.

Furthermore, the proposed rulemaking action does not meet any of the four applicability requirements listed in §2001.0225(a). Section 2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking action does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor does it adopt a rule solely under the general powers of the agency.

The Texas Health and Safety Code, Chapter 401, authorizes the commission to regulate the disposal of most radioactive substances in Texas. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. In addition, the State of Texas is an "Agreement State" authorized by the United States Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act of 1954, as amended (Atomic

Energy Act). The proposed rules do not exceed the standards set by federal law.

The proposed rules do not exceed an express requirement of state law. The Texas Health and Safety Code, Chapter 401, establishes general requirements for the licensing and disposal of radioactive substances, source material recovery, and commercial radioactive substances storage and processing. The purpose of the rulemaking is to implement statutory requirements consistent with recent amendments to Texas Health and Safety Code, Chapter 401, as provided in SB 1604.

The proposed rules do not exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an "Agreement State" by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC requirements for the regulation of radioactive materials and is adequate to protect health and safety. Under the *Agreement Between the United States Nuclear Regulatory Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended*, NRC requirements must be implemented to maintain a compatible state program for protection against hazards of radiation. The proposed rules do not exceed the NRC requirements nor exceed the requirements for retaining status as an "Agreement State."

These rules are proposed under specific authority of the Texas Health and Safety Code, Chapter 401. Sections 401.051, 401.103, 401.104, and 401.412 authorize the commission to adopt rules for the control of sources of radiation and the licensing of the disposal of radioactive substances. The commission invites public comment of the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules. These proposed rules implement SB 1604, transferring certain regulatory responsibilities for the control of radioactive material from the department to the commission. This proposed rulemaking is reasonably taken to fulfill an obligation required by federal law for the control of radioactive material, which is an exempt action under Texas Government Code, §2007.003(b)(4).

Nevertheless, the commission further evaluated these proposed rules and performed a preliminary assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of these proposed rules is to implement changes to TRCA required by SB 1604, 80th Legislature, 2007 for the regulation and licensing of the disposal of radioactive substances, recovery of source material, and commercial radioactive substances processing and storage. The proposed rules would substantially advance this purpose by transferring department requirements into commission rules to conform with the new statutory designation of jurisdiction.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations. The proposed rules implement SB 1604 which changes the state agency responsible for oversight of certain activities under TRCA. The proposed rules do not change the existing technical requirements that were in place under the department's program. Therefore, the commission's proposed rules do not affect real property in a manner that is different than may have been affected under the department's requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this proposed rulemaking action and determined that the proposed rules are neither identified in, nor will they affect, any action/authorization identified in Coastal Coordination Act Implementation Rules in 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the proposed rulemaking action is not subject to the CMP.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 25, 2007, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at http://www5.tceq.state.tx.us/rules/ecomments/. File size restrictions may apply to comments submitted via the eComments system. All comments should reference Rule Project Number 2007-028-336-PR. The comment period closes October 15, 2007. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Susan Jablonski, Director, Radioactive Materials Division, (512) 239-6731.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §336.1, §336.5

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also

known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments implement Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§336.1. Scope and General Provisions.

(a) Except as otherwise specifically provided, the rules in this chapter apply to all persons who dispose of radioactive substances; all persons who recover, mine, or process source material; and all persons who receive radioactive substances from other persons for storage or processing[, ~~except by-product material defined by §336.2(13)(B) of this title (relating to Definitions)~~].

(1) - (5) (No change.)

(b) - (e) (No change.)

(f) No person shall:

(1) - (2) (No change.)

(3) dispose of radioactive materials other than low-level radioactive waste, except for diffuse naturally occurring radioactive material waste having concentrations of less than 2000 pCi/g radium-226 or radium-228; [~~or~~]

(4) dispose of radioactive materials from other persons other than low-level radioactive waste, except for naturally occurring radioactive material waste in accordance with Subchapter K of this chapter (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste from Public Water Systems); [~~.~~]

(5) recover, mine, or process source material, except in accordance with Subchapter L of this chapter (relating to Licensing of Uranium Recovery and By-product Material Disposal Facilities);

(6) store, process, or dispose of by-product material, except in accordance with Subchapter L of this chapter; or

(7) receive radioactive substances from other persons for storage or processing, except in accordance with Subchapter M of this chapter (relating to Licensing of Radioactive Substances Processing and Storage Facilities).

(g) (No change.)

§336.5. Exemptions.

(a) - (b) (No change.)

(c) Waste, that is exempted from licensing requirements [~~by the Texas Department of Health~~] under Texas Health and Safety Code, §401.106(a), is exempted from the requirements of this chapter.

(d) Any material exempted from licensing requirements for disposal by the Texas Department of State Health Services under 25 TAC §289.251 and §289.259 prior to June 18, 2007 is exempted from the requirements of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703836
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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30 TAC §336.11

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The repeal is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed repeal implements Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007,

§§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§336.11. Memorandum of Understanding With the Texas Department of Health Regarding Radiation Control Functions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703837
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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SUBCHAPTER B. RADIOACTIVE SUBSTANCE FEES

30 TAC §336.105

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendment is also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendment implements Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§336.105. Schedule of Fees for Other Licenses.

(a) Each application for a license under Subchapter F of this chapter (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this chapter (relating to Decommissioning Standards), [~~or~~] Subchapter K of this chapter (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste from Public Water Systems), Subchapter L of this chapter (relating to Licensing of Uranium Recovery and By-product Material Disposal Facilities), or Subchapter M of this chapter (relating to Licensing of Radioactive Substances Processing and Storage Facilities) must be accompanied by an application fee as follows:

(1) (No change.)

(2) facilities regulated under Subchapter G of this chapter: $10,000; [~~or~~]

(3) facilities regulated under Subchapter K of this chapter: $50,000; [~~.~~]

(4) facilities regulated under Subchapter L of this chapter: $463,096 for conventional mining; $322,633 for in situ mining; $325,910 for heap leach; and $374,729 for disposal only; or

(5) facilities regulated under Subchapter M of this chapter: $3,830 for Waste Processing--Class I Exempt; $39,959 for Waste Processing--Class I; $94,661 for Waste Processing--Class II; and $273,800 for Waste Processing--Class III.

(b) An annual license fee shall be paid for each license issued under Subchapter F, Subchapter G, [~~and~~] Subchapter K, Subchapter L, and Subchapter M of this chapter. The amount of each annual fee is as follows:

(1) facilities regulated under Subchapter F of this chapter: $25,000; [~~or~~]

(2) facilities regulated under Subchapter G of this chapter: $8,400; [~~or~~]

(3) facilities regulated under Subchapter K of this chapter: $25,000; [~~.~~]

(4) facilities regulated under Subchapter L of this chapter that are operational: $60,929.50;

(5) facilities regulated under Subchapter L of this chapter that are in closure: $60,929.50;

(6) facilities regulated under Subchapter L of this chapter that are in post-closure: $52,011.50 for conventional mining; $26,006 for in situ mining; and $52,011.50 for disposal only;

(7) facilities regulated under Subchapter L of this chapter, if additional noncontiguous uranium recovery facility sites are authorized under the same license, the annual fee shall be increased by 25% for each additional site and 50% for sites in closure;

(8) facilities regulated under Subchapter L of this chapter, if an authorization for disposal of by-product material is added to a license, the annual fee shall be increased by 25%;

(9) facilities regulated under Subchapter L of this chapter, the following one-time fees apply if added after an environmental assessment has been completed on a facility:

(A) $28,658 for in situ wellfield on noncontiguous property;

(B) $71,651 for in situ satellite;

(C) $11,235 for wellfield on contiguous property;

(D) $50,756 for non-vacuum dryer; or

(E) $71, 651 for disposal (including processing, if applicable) of by-product material; or

(10) facilities regulated under Subchapter M of this chapter: $3,830 for Waste Processing--Class I Exempt; $39,959 for Waste Processing--Class I; $94,661 for Waste Processing--Class II; and $273,800 for Waste Processing--Class III.

(c) - (e) (No change.)

(f) For an application to dispose of by-product material that was filed with the Texas Department of State Health Services on or before January 1, 2007, the commission may assess and collect additional fees from the applicant to recover costs. Recoverable costs include costs incurred by the commission for administrative review, technical review, and hearings associated with the application. The executive director shall send an invoice for the amount of the costs incurred during the period September 1 through August 31 of each year. Payment shall be made within 30 days following the date of the invoice.

(g) If a licensee remitted a biennial licensing fee to the Texas Department of State Health Services during the one year period prior to June 17, 2007, the licensee is not subject to an annual fee under subsection (b) of this section until the expiration of the second year for which the biennial fee was paid.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703838
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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SUBCHAPTER C. GENERAL LICENSING REQUIREMENTS

30 TAC §§336.201, 336.203, 336.207, 336.211, 336.213

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments implement Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§336.201. Purpose and Scope.

This subchapter establishes general licensing [~~disposal~~] requirements for all radioactive materials, except [~~byproduct material defined by §336.2(13)(B) of this title (relating to Definitions) and~~] oil and gas naturally occurring radioactive material waste.

§336.203. License Required.

No person shall dispose of radioactive material unless that person has a license from the Texas Commission on Environmental Quality, or an exemption [~~from the Texas Department of Health~~] under Texas Health and Safety Code, §401.106(a).

§336.207. General Requirements for Issuance of a License.

An application may be approved if the commission determines that the requirements set forth in the applicable subchapter of this chapter and Chapter 305, Subchapter C of this title (relating to Application for Permit) have been met and that:

(1) the applicant is qualified by training and experience to conduct the proposed radioactive material [~~disposal~~] activities in accordance with the rules in this chapter in such a manner as to protect and minimize danger to the public health and safety and the environment;

(2) - (3) (No change.)

(4) the applicant for a license issued under Subchapter H of this chapter (relating to Licensing Requirements for Near-surface Land Disposal of Low-level Radioactive Waste) has acquired the title to and any interest in land and buildings, including the surface and mineral estates, on which the facility or facilities are to be located by either having acquired:

(A) - (B) (No change.)

(5) (No change.)

§336.211. General Requirements for Radioactive Material Disposal.

(a) Unless otherwise exempted, a licensee may dispose of licensed material, as appropriate to the type of licensed material, only:

(1) by transfer to an authorized recipient as provided in §336.331(g) and (h) of this title (relating to Transfer of Radioactive Material), [~~or in~~] Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste), or in Subchapter L of this chapter (relating to Licensing of Uranium Recovery and By-product Material Disposal Facilities);

(2) - (9) (No change.)

(b) (No change.)

(c) Except as provided in subsection (d) of this section, the [~~The~~] processing and storage of radioactive material received from

other persons is subject to Subchapter M of this chapter (relating to Licensing of Radioactive Substances Processing and Storage Facilities) [applicable rules of the Department of State Health Services (DSHS), except as provided in subsection (d) of this section].

(d) The receipt, storage, and/or processing of radioactive materials[, except for by-product material under the jurisdiction of the DSHS and oil and gas naturally occurring radioactive material waste,] received at a licensed commercial radioactive material disposal facility for the explicit purpose of disposal at that facility shall be regulated in accordance with the license authorizing disposal under this chapter [25 TAC §289.101(d)(1) (relating to Memorandum of Understanding Between the Texas Department of Health and the Texas Natural Resource Conservation Commission Regarding Radiation Control Functions)].

(e) - (f) (No change.)

§336.213. Method of Obtaining Approval of Proposed Activities [Disposal Procedures].

(a) A person who plans to dispose of radioactive material; store or process radioactive substances from other persons; or recover, mine or process source material shall submit an application for a license according to Chapter 305 of this title (relating to Consolidated Permits) and the applicable subchapter in this chapter.

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703839
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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SUBCHAPTER G. DECOMMISSIONING STANDARDS

30 TAC §§336.601, 336.613, 336.619

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The amendments are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed amendments implement Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§336.601. Applicability.

(a) The criteria in this subchapter apply to the decommissioning of facilities regulated under Subchapter F of this chapter (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), the inactive disposal sites regulated under this subchapter, the ancillary surface facilities that support low-level radioactive waste disposal, source material recovery, or by-product material disposal activities at facilities licensed under Subchapter H of this chapter (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) or Subchapter L of this chapter (relating to Licensing of Uranium Recovery or By-product Material Disposal Facilities), [and to] naturally occurring radioactive material waste disposal facilities licensed under Subchapter K of this chapter (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste from Public Water Systems), and to radioactive substances processing and storage facilities licensed under Subchapter M of this chapter (relating to Licensing of Radioactive Substances Processing and Storage Facilities).

(b) - (d) (No change.)

§336.613. Additional Requirements.

(a) (No change.)

(b) A decommissioning plan shall be submitted with the license application required by §336.615 of this title (relating to Inactive Disposal Sites) and §336.1211 of this title (relating to Filing Application for a Special License) [relating to (Inactive Disposal Sites)]. Holders of licenses of inactive disposal sites shall submit a decommissioning plan with the renewal application. Holders of licenses of active disposal sites shall submit a decommissioning plan no later than the date specified in §336.625(e)(2) of this title (relating to Expiration and Termination of Licenses).

(c) - (l) (No change.)

§336.619. Financial Assurance for Decommissioning.

(a) (No change.)

(b) Applicants for a new license to decommission an inactive disposal site and applicants for a license under Subchapters K, L, or M of this chapter (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste from Public Water Systems; Licensing of Uranium Recovery and By-product Material Disposal Facilities; and Licensing of Radioactive Substances Processing and Storage Facilities) shall submit with the application a signed statement regarding how the applicant will provide financial assurance for decommissioning using one or more of the mechanisms specified in Chapter 37 of this title. The amount of financial assurance shall be based upon the detailed cost estimate included in the decommissioning plan submitted

with the application. [~~The financial assurance for decommissioning shall be provided at least 30 days prior to license issuance and be effective upon license issuance.~~]

(c) Holders of licenses for inactive disposal sites issued before January 1, 1998 shall submit a funding plan before January 1, 1998. Each funding plan must contain:

(1) - (3) (No change.)

(d) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703840
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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SUBCHAPTER L. LICENSING OF URANIUM RECOVERY AND BY-PRODUCT MATERIAL DISPOSAL FACILITIES

30 TAC §§336.1101, 336.1103, 336.1105, 336.1107, 336.1109, 336.1111, 336.1113, 336.1115, 336.1117, 336.1119, 336.1121, 336.1123, 336.1125, 336.1127, 336.1129, 336.1131, 336.1133, 336.1135

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The new sections are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed new sections implement Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§336.1101. Purpose.

This subchapter provides for the specific licensing of the receipt, possession, use, or disposal of radioactive material in uranium recovery facilities and other operations that accept by-product material for disposal. No person may engage in such activities except as authorized in a specific license issued in accordance with this subchapter.

§336.1103. Scope.

In addition to the requirements of this subchapter, all licensees, unless otherwise specified, are subject to the requirements of Subchapters A - E and G of this chapter (relating to General Provisions; Radioactive Substance Fees; General Disposal Requirements; Standards for Protection Against Radiation; Notices, Instructions, and Reports to Workers and Inspections; and Decommissioning Standards).

§336.1105. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Aquifer--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs. Any saturated zone created by uranium or thorium recovery operations would not be considered an aquifer unless the zone is or potentially is:

(A) hydraulically interconnected to a natural aquifer;

(B) capable of discharge to surface water; or

(C) reasonably accessible because of migration beyond the vertical projection of the boundary of the land transferred for long-term government ownership and care in accordance with §336.1131 of this title (relating to Land Ownership of By-Product Material Disposal Sites).

(2) As expeditiously as practicable considering technological feasibility--As quickly as possible considering the physical characteristics of the by-product material and the site, the limits of "available technology" (as defined in this section), the need for consistency with mandatory requirements of other regulatory programs, and "factors beyond the control of the licensee" (as defined in this section). The phrase permits consideration of the cost of compliance only to the extent specifically provided for by use of the term "Available technology."

(3) Available technology--Technologies and methods for emplacing a final radon barrier on by-product material piles or impoundments. This term must not be construed to include extraordinary measures or techniques that would impose costs that are grossly excessive as measured by practice within the industry (or one that is reasonably analogous), (for example, by way of illustration only, unreasonable overtime, staffing, or transportation requirements, etc., considering normal practice in the industry; laser fusion of soils; etc.), provided there is reasonable progress toward emplacement of the final radon barrier. To determine grossly excessive costs, the relevant baseline against which costs must be compared is the cost estimate for tailings impoundment closure contained in the licensee's approved reclamation plan, but costs beyond these estimates shall not automatically be considered grossly excessive.

(4) By-product material--Tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium

from any ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes. Underground ore bodies depleted by such solution extraction operations do not constitute "by-product material" within this definition.

(5) Capable fault--As used in this section, "Capable fault" has the same meaning as defined in Section III(g) of Appendix A of Title 10 Code of Federal Regulations (CFR) Part 100.

(6) Closure--The post-operational activities to decontaminate and decommission the buildings and site used to produce by-product materials and reclaim the tailings or disposal area, including groundwater restoration, if needed.

(7) Closure plan--The plan approved by the agency to accomplish closure. The closure plan consists of a decommissioning plan and may also include a reclamation plan.

(8) Commencement of construction--Any clearing of land, excavation, or other substantial action that would adversely affect the environment of a site, but does not include necessary borings to determine site characteristics or other preconstruction monitoring to establish background information related to the suitability of a site, or to the protection of the environment.

(9) Compliance period--The period of time that begins when the agency sets secondary groundwater protection standards and ends when the owner or operator's license is terminated and the site is transferred to the state or federal government for long-term care, if applicable.

(10) Dike--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(11) Disposal area--The area containing by-product materials to which the requirements of §336.1129(p) - (aa) of this title (relating to Technical Requirements) apply.

(12) Existing portion--As used in §336.1129(i)(1) of this title, "existing portion" is that land surface area of an existing surface impoundment on which significant quantities of by-product materials had been placed prior to September 30, 1983.

(13) Factors beyond the control of the licensee--Factors proximately causing delay in meeting the schedule in the applicable reclamation plan for the timely emplacement of the final radon barrier notwithstanding the good faith efforts of the licensee to complete the barrier in compliance with §336.1129(x) of this title. These factors may include but are not limited to:

(A) physical conditions at the site;

(B) inclement weather or climatic conditions;

(C) an act of God;

(D) an act of war;

(E) a judicial or administrative order or decision, or change to the statutory, regulatory, or other legal requirements applicable to the licensee's facility that would preclude or delay the performance of activities required for compliance;

(F) labor disturbances;

(G) any modifications, cessation or delay ordered by state, federal, or local agencies;

(H) delays beyond the time reasonably required in obtaining necessary government permits, licenses, approvals, or consent for activities described in the reclamation plan proposed by the licensee that result from government agency failure to take final action after the licensee has made a good faith, timely effort to submit legally sufficient applications, responses to requests (including relevant data requested by the agencies), or other information, including approval of the reclamation plan; and

(I) an act or omission of any third party over whom the licensee has no control.

(14) Final radon barrier--The earthen cover (or approved alternative cover) over by-product material constructed to comply with §336.1129(p) - (aa) of this title (excluding erosion protection features).

(15) Groundwater--Water below the land surface in a zone of saturation. For purposes of this subchapter, groundwater is the water contained within an aquifer as defined in this section.

(16) Hazardous constituent--Subject to §336.1129(j)(5) of this title, "hazardous constituent" is a constituent that meets all three of the following tests:

(A) the constituent is reasonably expected to be in or derived from the by-product material in the disposal area;

(B) the constituent has been detected in the groundwater in the uppermost aquifer; and

(C) the constituent is listed in 10 Code of Federal Regulations Part 40, Appendix A, Criterion 13.

(17) Leachate--Any liquid, including any suspended or dissolved components in the liquid, that has percolated through or drained from the by-product material.

(18) Licensed site--The area contained within the boundary of a location under the control of persons generating or storing by-product materials under a license.

(19) Liner--A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment that restricts the downward or lateral escape of by-product material, hazardous constituents, or leachate.

(20) Maximum credible earthquake--That earthquake that would cause the maximum vibratory ground motion based upon an evaluation of earthquake potential considering the regional and local geology and seismology and specific characteristics of local subsurface material.

(21) Milestone--An action or event that is required to occur by an enforceable date.

(22) Operation--The period of time during which a by-product material disposal area is being used for the continued placement of by-product material or is in standby status for such placement. A disposal area is in operation from the day that by-product material is first placed in it until the day final closure begins.

(23) Point of compliance--The site-specific location in the uppermost aquifer where the groundwater protection standard shall be met. The objective in selecting the point of compliance is to provide the earliest practicable warning that an impoundment is releasing hazardous constituents to the groundwater. The point of compliance is selected to provide prompt indication of groundwater contamination on the hydraulically downgradient edge of the disposal area.

(24) Principal activities--Activities authorized by the license that are essential to achieving the purpose(s) for which the license is issued or amended. Storage during which no licensed material is accessed for use or disposal and activities incidental to decontamination or decommissioning are not principal activities.

(25) Reclamation plan--For the purposes of §336.1129(p) - (aa) of this title, "reclamation plan" is the plan detailing activities to accomplish reclamation of the by-product material disposal area in accordance with the technical criteria of this section. The reclamation plan shall include a schedule for reclamation milestones that are key to the completion of the final radon barrier, including as appropriate, but not limited to, windblown tailings retrieval and placement on the pile, interim stabilization (including dewatering or the removal of free-standing liquids and recontouring), and final radon barrier construction. Reclamation of by-product material shall also be addressed in the closure plan. The detailed reclamation plan may be incorporated into the closure plan.

(26) Security (surety)--This term has the same meaning as financial assurance.

(27) Surface impoundment--A natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well.

(28) Unrefined and unprocessed ore--Ore in its natural form before any processing, such as grinding, roasting, beneficiating, solution extracting, or refining.

(29) Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary.

(30) Uranium recovery--Any uranium extraction or concentration activity that results in the production of "by-product material" as it is defined in this chapter. As used in this definition, "Uranium recovery" has the same meaning as "uranium milling" in 10 Code of Federal Regulations §40.4.

§336.1107. Filing Application for Specific Licenses.

Unless otherwise specified, an applicant for a license is subject to the requirements in §336.205 of this title (relating to Application Requirements). The applicant shall also comply with the following additional filing requirements.

(1) Applications for specific licenses shall be filed in seven copies in a manner specified by the agency.

(2) Each applicant shall demonstrate to the agency that the applicant is financially qualified to conduct the licensed activity, including any required decontamination, decommissioning, reclamation, and disposal, before the agency issues or renews a license by posting security as required under §336.1125 of this title (relating to Financial Security Requirements).

(3) An application for a license shall contain written specifications relating to the uranium recovery facility operations and the disposition of the by-product material.

(4) Each application shall clearly demonstrate how the requirements of §§336.1107, 336.1109, 336.1111, 336.1113, 336.1125, 336.1127, 336.1129, and 336.1131 of this title (relating to Filing Application for Specific Licenses; General Requirements for the Issuance of Specific Licenses; Special Requirements for a License Application for Uranium Recovery and By-Product Material Disposal Facilities; Specific Terms and Conditions of Licenses; Financial Security Requirements; Long-Term Care and Maintenance Requirements; Technical Requirements; and Land Ownership of By-Product Material Disposal Sites) have been addressed.

(5) Applications for new licenses shall be processed in accordance with Chapter 281 of this title (relating to Applications Processing).

§336.1109. General Requirements for the Issuance of Specific Licenses.

A license application may be approved if the agency determines that the applicant has met the requirements of §336.207 of this title (relating to General Requirements for Issuance of a License) and the following:

(1) qualifications of the designated radiation safety officer (RSO) are adequate for the purpose requested in the application and include as a minimum:

(A) have earned at least a bachelor's degree in a physical or biological science, industrial hygiene, health physics, radiation protection, or engineering from an accredited college or university, or an equivalent combination of training and relevant experience, with two years of relevant experience equivalent to a year of academic study, from a uranium or mineral extraction/recovery, radioactive waste processing, or a radioactive waste or by-product material disposal facility;

(B) have at least one year of relevant experience, in addition to that used to meet the educational requirement, working under the direct supervision of the radiation safety officer at a uranium or mineral extraction/recovery, radioactive waste processing, or radioactive waste or by-product material disposal facility; and

(C) have at least four weeks of specialized training in health physics or radiation safety applicable to uranium or mineral extraction/recovery, radioactive waste processing, or radioactive waste or by-product material disposal operations from a course provider that has been evaluated and approved by the agency; and

(2) the applicant satisfies all applicable special requirements in this subchapter.

§336.1111. Special Requirements for a License Application for Uranium Recovery and By-product Material Disposal Facilities.

In addition to the requirements in §336.1109 of this title (relating to General Requirements for the Issuance of Specific Licenses), a license may be issued if the applicant submits the items in paragraph (1) of this section for agency approval and meets the conditions in paragraphs (2) and (3) of this section.

(1) An application for a license must include the following:

(A) for new licenses, an environmental report that includes the results of a one-year preoperational monitoring program and for renewal of licenses, an environmental report containing the results of the operational monitoring program. Both must also include the following:

(i) description of the proposed project or action;

(ii) area/site characteristics including ecology, geology, topography, hydrology, meteorology, historical and cultural landmarks, and archaeology;

(iii) radiological and nonradiological impacts of the proposed project or action, including waterway and groundwater impacts and any long-term impacts;

(iv) environmental effects of accidents;

(v) by-product material disposal, decommissioning, decontamination, and reclamation and impacts of these activities; and

(vi) site and project alternative;

(B) a closure plan for decontamination, decommissioning, restoration, and reclamation of buildings and the site to levels that would allow unrestricted use and for reclamation of the by-product material disposal areas in accordance with the technical requirements of §336.1129 of this title (relating to Technical Requirements);

(C) proposal of an acceptable form and amount of financial security consistent with the requirements of §336.1125 of this title (relating to Financial Security Requirements);

(D) procedures describing the means employed to meet the requirements of §336.1113(1) and (2) of this title (relating to Specific Terms and Conditions of Licenses) and §336.1129(o) of this title during the operational phase of any project;

(E) specifications for the emissions control and disposition of the by-product material; and

(F) for disposal of by-product material received from others, information on the chemical and radioactive characteristics of the wastes to be received, detailed procedures for receiving and documenting incoming waste shipments, and detailed waste acceptance criteria.

(G) an adequate operating, radiation safety, and emergency procedures manual; and

(H) a signed certification from the owner or owners of the real property on which radioactive substances are recovered, stored, processed, or disposed acknowledging that:

(i) radioactive substances are recovered, stored, processed or disposed on the property with the consent of the property owner or owners; and

(ii) decommissioning of the site may be required even if the applicant or licensee is unable or fails to decommission the site as required by a license, rule or order of the commission.

(2) Except as provided in this section, the applicant shall not commence construction at the site until the agency has issued the license. Commencement of construction prior to issuance of the license shall be grounds for denial of a license. For an application for a new license to dispose of by-product material that was filed with the Texas Department of State Health Services on or before January 1, 2007, the applicant may commence construction as provided in §336.1135 of this title (relating to Construction Activities), at the applicant's own risk, upon the executive director's issuance of the Environmental Analysis provided under §281.21(f) of this title (relating to Draft Permit, Technical Summary, Fact Sheet, and Compliance History).

(3) Facility drawings submitted in conjunction with the application for a license shall be prepared by a professional engineer or engineering firm. Those drawings shall be final and shall be signed, sealed and dated in accordance with the requirements of the Texas Board of Professional Engineers, 22 Texas Administrative Code Chapter 131.

§336.1113. Specific Terms and Conditions of Licenses.

Unless otherwise specified, each license issued in accordance with this section is subject to the requirements of §305.125 of this title (relating to Standard Permit Conditions) and the following.

(1) Daily inspection of any by-product material retention systems shall be conducted by the licensee. General qualifications for individuals conducting inspections shall be approved by the agency. Records of the inspections shall be maintained for review by the agency.

(2) In addition to the applicable requirements of §336.350 and §336.352 of this title (relating to Reports of Stolen, Lost, or Missing Licensed Radioactive Material and Reports of Exposures, Radiation Levels, and Concentrations of Radioactive Material Exceeding the Limits), the licensee shall immediately notify the agency of the following:

(A) any failure in a by-product material retention system that results in a release of by-product material into unrestricted areas;

(B) any release of radioactive material that exceeds the concentrations for water listed in Table II, Column 2, of §336.359 of this title (relating to Appendix B. Annual Limits in Intake (ALI) and Derived Air Concentrations (DAC) of Radionuclides for Occupational Exposure; Effluent Concentrations; Concentrations for Release to Sanitary Sewerage) and that extends beyond the licensed boundary;

(C) any spill that exceeds 20,000 gallons and that exceeds the concentrations for water listed in Table II, Column 2, of §336.359 of this title; or

(D) any release of solids that exceeds the limits in §336.1115(e) of this title (relating to Expiration and Termination of Licenses; Decommissioning of Sites, Separate Buildings or Outdoor Areas) and that extends beyond the licensed boundary.

(3) In addition to the applicable requirements of Chapter 327 of this title (relating to Spill Prevention and Control) and §336.350 and §336.352 of this title, the licensee shall notify the agency within 24 hours of the following:

(A) any spill that extends:

(i) beyond the wellfield monitor well ring;

(ii) more than 400 feet from an injection or production well pipe artery to or from a recovery plant; or

(iii) more than 200 feet from a recovery plant; or

(B) any spill that exceeds 2,000 gallons and that exceeds the concentrations for water listed in Table II, Column 2, of §336.359 of this title.

(4) A licensee shall submit to the agency at five year intervals from the issuance of the license or at the time of renewal, if renewal and reevaluation occur in the same year, continued proof of the licensee's financial qualifications.

(5) At any time before termination of the license, the licensee shall submit written statements under oath upon request of the commission or executive director to enable the commission to determine whether or not the license should be modified, suspended, or revoked.

(6) The licensee shall be subject to the applicable provisions of Texas Health and Safety Code, Chapter 401, also known as the Texas Radiation Control Act (TRCA) now or hereafter in effect and to applicable rules and orders of the commission. The terms and conditions of the license are subject to amendment, revision, or modification, by reason of amendments to TRCA or by reason of rules and orders issued in accordance with terms of TRCA.

(7) Any license may be revoked, suspended, or modified, in whole or in part, for any material false statement in the application or any statement of fact required under provisions of TRCA, or because of conditions revealed by any application or statement of fact or any report, record or inspection or other means that would warrant the commission to refuse to grant a license on the original application, or for failure to operate the facility in accordance with the terms of the license, or for any violation of or failure to observe any of the terms and conditions of TRCA or the license or of any rule or order of the commission.

(8) Each person licensed by the commission under this subchapter shall confine possession and use of radioactive materials to the locations and purposes authorized in the license.

(9) No by-product may be disposed of until the executive director has inspected the facility and has found it to be conformance with the description, design, and construction described in the application for a by-product disposal license. No by-product may be received for disposal at the facility until the executive director has approved financial assurance.

(10) The commission may incorporate in any license at the time of issuance, or thereafter, by appropriate rule or order, additional requirements or conditions with respect to the licensee's receipt, possession, or disposal of by-product as it deems appropriate or necessary in order to:

(A) protect the health and safety of the public and the environment; or

(B) require reports and recordkeeping and to provide for inspections of activities under the licenses that may be necessary or appropriate to effectuate the purposes of TRCA and rules thereunder.

§336.1115. Expiration and Termination of Licenses; Decommissioning of Sites, Separate Buildings or Outdoor Areas.

(a) The term of the specific license is for a fixed term not to exceed ten years.

(b) Expiration of the specific license does not relieve the licensee of the requirements of this chapter.

(c) All license provisions continue in effect beyond the expiration date with respect to possession of radioactive material until the agency notifies the former licensee in writing that the provisions of the license are no longer binding. During this time, the former licensee must:

(1) be limited to actions involving radioactive material that are related to decommissioning; and

(2) continue to control entry to restricted areas until the location(s) is suitable for release for unrestricted use in accordance with the requirements of subsection (e) of this section.

(d) Within 60 days of the occurrence of any of the following, each licensee must provide notification to the agency in writing and either begin decommissioning its site, or any separate buildings or outdoor areas that contain residual radioactivity in accordance with the closure plan in §336.1111(1)(B) of this title (relating to Special Requirements for a License Application for Uranium Recovery and By-Product Material Disposal Facilities), so that the buildings or outdoor areas are suitable for release in accordance with subsection (e) of this section if:

(1) the license has expired in accordance with subsection (a) of this section; or

(2) the licensee has decided to permanently cease principal activities, as defined in §336.1105(24) of this title (relating to Definitions), at the entire site or in any separate building or outdoor area; or

(3) no principal activities have been conducted for a period of 24 months in any building or outdoor area that contains residual radioactivity such that the building or outdoor area is unsuitable for release in accordance with agency requirements.

(e) Outdoor areas are considered suitable for release for unrestricted use if the following limits are not exceeded.

(1) The concentration of radium-226 or radium-228 (in the case of thorium by-product material) in soil, averaged over any 100 square meters (m^2), may not exceed the background level by more than:

(A) 5 picocuries per gram (pCi/g) (0.185 becquerel per gram (Bq/g)), averaged over the first 15 cm of soil below the surface; and

(B) 15 pCi/g (0.555 Bq/g), averaged over 15 cm thick layers of soil more than 15 cm below the surface.

(2) The contamination of vegetation may not exceed 5 pCi/g (0.185 Bq/g), based on dry weight, for radium-226 or radium-228.

(3) The concentration of natural uranium in soil, with no daughters present, averaged over any 100 m^2, may not exceed the background level by more than:

(A) 30 pCi/g (1.11 Bq/g), averaged over the top 15 cm of soil below the surface; and

(B) 150 pCi/g (5.55 Bq/g), average concentration at depths greater than 15 centimeters below the surface.

(f) Coincident with the notification required by subsection (c) of this section, the licensee shall maintain in effect all decommissioning financial security established by the licensee in accordance with §336.1125 of this title (relating to Financial Security Requirements) in conjunction with a license issuance or renewal or as required by this section. The amount of the financial security must be increased, or may be decreased, as appropriate, with agency approval, to cover the detailed cost estimate for decommissioning established in accordance with subsection (l)(5) of this section.

(g) In addition to the provisions of subsection (h) of this section, each licensee must submit an updated closure plan to the agency within 12 months of the notification required by subsection (d) of this section. The updated closure plan must meet the requirements of §336.1111(1)(B) and §336.1125 of this title. The updated closure plan must describe the actual conditions of the facilities and site and the proposed closure activities and procedures.

(h) The agency may grant a request to delay or postpone initiation of the decommissioning process if the agency determines that such relief is not detrimental to the occupational and public health and safety and is otherwise in the public interest. The request must be submitted no later than 30 days before notification in accordance with subsection (d) of this section. The schedule for decommissioning in subsection (d) of this section may not begin until the agency has made a determination on the request.

(i) A decommissioning plan must be submitted if required by license condition or if the procedures and activities necessary to carry out decommissioning of the site or separate building or outdoor area have not been previously approved by the agency and these procedures could increase potential health and safety impacts to workers or to the public, such as in any of the following cases:

(1) procedures would involve techniques not applied routinely during cleanup or maintenance operations;

(2) workers would be entering areas not normally occupied where surface contamination and radiation levels are significantly higher than routinely encountered during operation;

(3) procedures could result in significantly greater airborne concentrations of radioactive materials than are present during operation; or

(4) procedures could result in significantly greater releases of radioactive material to the environment than those associated with operation.

(j) The agency may approve an alternate schedule for submittal of a decommissioning plan required in accordance with subsection (d) of this section if the agency determines that the alternative schedule is necessary to the effective conduct of decommissioning operations and presents no undue risk from radiation to the occupational and public health and safety and is otherwise in the public interest.

(k) The procedures listed in subsection (i) of this section may not be carried out prior to approval of the decommissioning plan.

(l) The proposed decommissioning plan for the site or separate building or outdoor area must include:

(1) a description of the conditions of the site, separate buildings, or outdoor area sufficient to evaluate the acceptability of the plan;

(2) a description of planned decommissioning activities;

(3) a description of methods used to ensure protection of workers and the environment against radiation hazards during decommissioning;

(4) a description of the planned final radiation survey;

(5) an updated detailed cost estimate for decommissioning, comparison of that estimate with present funds set aside for decommissioning, and a plan for assuring the availability of adequate decommissioning; and

(6) for decommissioning plans calling for completion of decommissioning later than 24 months after plan approval, a justification for the delay based on the criteria in subsection (p) of this section.

(m) The proposed decommissioning plan may be approved by the agency if the information in the plan demonstrates that the decommissioning will be completed as soon as practicable and that the occupational health and safety of workers and the public will be adequately protected.

(n) Except as provided subsection (p) of this section, licensees shall complete decommissioning of the site or separate building or outdoor area as soon as practicable but no later than 24 months following the initiation of decommissioning.

(o) Except as provided in subsection (p) of this section, when decommissioning involves the entire site, the licensee must request license termination as soon as practicable but no later than 24 months following the initiation of decommissioning.

(p) The agency may approve a request for an alternate schedule for completion of decommissioning of the site or separate buildings or outdoor areas and the license termination if appropriate, if the agency determines that the alternative is warranted by the consideration of the following:

(1) whether it is technically feasible to complete decommissioning within the allotted 24-month period;

(2) whether sufficient waste disposal capacity is available to allow completion of decommissioning within the allotted 24-month period; and

(3) other site-specific factors that the agency may consider appropriate on a case-by-case basis, such as the regulatory requirements of other government agencies, lawsuits, groundwater treatment activities, monitored natural groundwater restoration, actions that could result in more environmental harm than deferred cleanup, and other factors beyond the control of the licensee.

(q) As the final step in decommissioning, the licensee must:

(1) certify the disposition of all radioactive material, including accumulated by-product material;

(2) conduct a radiation survey of the premises where the licensed activities were carried out and submit a report of the results of this survey unless the licensee demonstrates that the premises are suitable for release in accordance with subsection (e) of this section. The licensee shall, as appropriate:

(A) report the following levels:

(i) gamma radiation in units of microroentgen per hour (µR/hr) (millisieverts per hour (mSv/hr)) at 1 meter (m) from surfaces;

(ii) radioactivity, including alpha and beta, in units of disintegrations per minute (dpm) or microcuries (µCi) (megabecquerels (MBq)) per 100 square centimeters (cm^2) for surfaces;

(iii) µCi (MBq) per milliliter for water; and

(iv) picocuries (pCi) (becquerels (Bq)) per gram (g) for solids such as soils or concrete; and

(B) specify the manufacturer's name, and model and serial number of survey instrument(s) used and certify that each instrument is properly calibrated and tested.

(r) The executive director will provide written notification to specific licensees, including former licensees with license provisions continued in effect beyond the expiration date in accordance with subsection (d) of this section, that the provisions of the license are no longer binding. The executive director will provide such notification when the executive director determines that:

(1) radioactive material has been properly disposed;

(2) reasonable effort has been made to eliminate residual radioactive contamination, if present;

(3) a radiation survey has been performed that demonstrates that the premises are suitable for release in accordance with agency requirements;

(4) other information submitted by the licensee is sufficient to demonstrate that the premises are suitable for release in accordance with the requirements of subsection (e) of this section;

(5) all records required by §336.343 of this title (relating to Records of Surveys) have been submitted to the agency;

(6) the licensee has paid any outstanding fees required by this chapter and has resolved any outstanding notice(s) of violation issued to the licensee;

(7) the licensee has met the applicable technical and other requirements for closure and reclamation of a by-product material disposal site; and

(8) the United States Nuclear Regulatory Commission (NRC) has made a determination that all applicable standards and requirements have been met.

(s) Licenses for uranium recovery or by-product material disposal are exempt from subsections (d)(3), (g), and (h) of this section with respect to reclamation of by-product material impoundments or disposal areas. Timely reclamation plans for by-product material disposal areas must be submitted and approved in accordance with §336.1129(p) - (aa) of this title (relating to Technical Requirements).

(t) A licensee may request that a subsite or a portion of a licensed site be released for unrestricted use before full license termination as long as release of the area of concern will not adversely impact

the remaining unaffected areas and will not be recontaminated by ongoing authorized activities. When the licensee is confident that the area of concern will be acceptable to the agency for release for unrestricted use, a written request for release for unrestricted use and agency confirmation of closeout work performed shall be submitted to the agency. The request should include a comprehensive report, accompanied by survey and sample results that show contamination is less than the limits specified in subsection (e) of this section and an explanation of how ongoing authorized activities will not adversely affect the area proposed to be released. Upon confirmation by the agency that the area of concern is releasable for unrestricted use, the licensee may apply for a license amendment, if required.

§336.1117. Renewal of Licenses.

(a) Application for a renewal of specific licenses must be filed in accordance with §336.1107 of this title (relating to Filing Application for Specific Licenses) and §336.1111(1) of this title (relating to Special Requirements for a License Application for Uranium Recovery and By-Product Material Disposal Facilities). Application for a renewal of a specific license must be filed by the date specified in the license. If the licensee fails to apply for a renewal and fails to pay the fee required by Subchapter B of this chapter, the license expires and the licensee must comply with the requirements of §336.1115 of this title (relating to Expiration and Termination of Licenses; Decommissioning of Sites, Separate Buildings, or Outdoor Areas). In any application for renewal, the applicant may incorporate drawings by clear and specific reference (for example, title, date and unique number of drawing), if no modifications have been made since previously submitted.

(b) In any case in which a licensee, prior to expiration of the existing license, has filed a request in proper form for a renewal or for a new license authorizing the same activities, such existing license will not expire until the application has been finally determined by the agency. In any case in which a licensee, not more than 30 days after the expiration of an existing license, has filed an application for renewal or for a new license authorizing the same activities and paid the fee required by Subchapter B of this chapter, the agency may reinstate the license and extend the expiration until the request has been finally determined by the agency.

(c) An application for renewal of a license may be approved if the agency determines that the requirements of §336.1109 of this title (relating to General Requirements for the Issuance of Specific Licenses) have been satisfied.

§336.1119. Amendment of Licenses at Request of Licensee.

Requests for amendment of a license shall be filed in accordance with §336.1107 of this title (relating to Filing Application for Specific Licenses) and §336.205 of this title (relating to Application Requirements). Such requests shall be signed by the radiation safety officer and specify how the licensee desires the license to be amended and the basis for such amendment.

§336.1121. Agency Action on Applications to Renew or Amend.

In considering a request by a licensee to renew or amend a license, the agency will apply the appropriate criteria in §336.1109 of this title (relating to General Requirements for the Issuance of Specific Licenses) and §336.1111 of this title (relating to Special Requirements for a License Application for Uranium Recovery and By-Product Material Disposal Facilities).

§336.1123. Transfer of Material.

(a) A licensee may not transfer radioactive material except as authorized in accordance with this chapter.

(b) Except as otherwise provided in a license and subject to the provisions of subsections (c) and (d) of this section, any licensee may transfer radioactive material:

(1) to the agency after receiving prior approval from the agency;

(2) to the United States Department of Energy;

(3) to any person exempt from the licensing requirements of the Texas Radiation Control Act and these requirements or exempt from the licensing requirements of the United States Nuclear Regulatory Commission (NRC) or an agreement state, to the extent permitted by these exemptions;

(4) to any person authorized to receive such material in accordance with terms of a general license or its equivalent, a specific license or equivalent licensing document issued by the agency, NRC, any agreement state, any licensing state, or to any person otherwise authorized to receive such material by the federal government or any agency of the federal government, or the agency;

(5) to any person abroad pursuant to an export license issued under Title 10, Chapter 1, Code of Federal Regulations Part 110; or

(6) as otherwise authorized by the agency in writing.

(c) Before transferring radioactive material to a specific licensee of the agency, NRC, an agreement state, a licensing state, or to a general licensee who is required to register with the agency, the licensee transferring the radioactive material shall verify that the transferee's license authorizes the receipt of the type, form, and quantity of radioactive material to be transferred.

(d) The following methods for the verification of subsection (c) of this section are acceptable:

(1) the transferor may possess and have read a current copy of the transferee's specific license or registration certificate;

(2) the transferor may possess a written certification by the transferee that the transferee is authorized by the license or certificate of registration to receive the type, form, and quantity of radioactive material to be transferred, specifying the license or registration certificate number, issuing agency, and expiration date;

(3) for emergency shipments, the transferor may accept oral certification by the transferee that the transferee is authorized by license or registration certificate to receive the type, form, and quantity of radioactive material to be transferred, specifying the license or registration certificate number, issuing agency, and expiration date, provided that the oral certification is confirmed in writing within ten days; or

(4) when none of the methods of verification described in paragraphs (1)-(3) of this subsection are readily available or when a transferor desires to verify that information received by one of these methods is correct or up-to-date, the transferor may obtain and record confirmation from the agency, or the NRC, that the transferee is licensed to receive the radioactive material.

(e) Preparation for shipment and transport of radioactive material shall be in accordance with the provisions of §336.332 of this title (relating to Preparation of Radioactive Material for Transport).

§336.1125. Financial Security Requirements.

(a) Financial security for decontamination, decommissioning, reclamation, restoration, disposal, and any other requirements of the agency shall be established by each licensee 60 days prior to the receipt or possession of radioactive substances to assure that sufficient funds will be available to carry out the decontamination and decommissioning of buildings and the site and for the reclamation of any by-product material disposal areas. The amount of funds to be ensured by such se-

curity arrangements shall be based on agency-approved cost estimates in an agency-approved closure plan for:

(1) decontamination and decommissioning of buildings and the site to levels that allow unrestricted use of these areas upon decommissioning; and

(2) the reclamation of by-product material disposal areas in accordance with technical criteria delineated in §336.1129 of this title (relating to Technical Requirements).

(b) The licensee shall submit this closure plan in conjunction with an environmental report that addresses the expected environmental impacts of the licensee's operation, decommissioning and reclamation, and evaluates alternatives for mitigating these impacts.

(c) The security shall also cover the payment of the charge for long-term surveillance and control for by-product material disposal areas required by §336.1127(c) of this title (relating to Long-Term Care and Maintenance Requirements).

(d) In establishing specific security arrangements, the licensee's cost estimates must take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work. In order to avoid unnecessary duplication and expense, the agency may accept financial securities that have been consolidated with financial or security arrangements established to meet requirements of other federal or state agencies and/or local governing bodies for such decommissioning, decontamination, reclamation, and long-term site surveillance and control, provided such arrangements are considered adequate to satisfy these requirements and that the portion of the security that covers the decommissioning and reclamation of the buildings, site, and by-product material disposal areas, and the long-term funding charge is clearly identified and committed for use in accomplishing these activities.

(e) The security shall be continuous for the term of the license and shall be payable in the State of Texas to the Perpetual Care Account.

(f) The licensee's financial assurance mechanism will be reviewed annually by the agency to assure that sufficient funds would be available for completion of the decommissioning and reclamation plan if the work had to be performed by an independent contractor. The amount of financial assurance must be adjusted to recognize any increases or decreases resulting from inflation, changes in engineering plans, activities performed, and any other conditions affecting costs. A licensee must submit annually a cost estimate report for decommissioning and reclamation in accordance with the decommissioning and reclamation plans by no later than the anniversary date of the issuance of the license. The licensee must provide any increase in the amount of financial assurance within 60 days of a determination of the cost estimate by the executive director.

(g) Financial assurance mechanisms submitted to comply with this subchapter must meet the requirements specified in Chapter 37, Subchapter T of this title (relating to Financial Assurance for Radioactive Substances). Regardless of whether reclamation is phased through the life of the operation or takes place at the end of operations, an appropriate portion of security liability shall be retained until final compliance with the reclamation plan is determined. This will yield a security that is at least sufficient at all times to cover the costs of decommissioning and reclamation of the areas that are expected to be disturbed before the next license renewal.

(h) Self-insurance, or any arrangement that essentially constitutes self-insurance (for example, a contract with a state or federal agency), will not satisfy the security requirement since this provides no additional assurance other than that which already exists through license requirements.

(i) Licensees with financial assurance mechanisms issued in accordance with the requirements of the Texas Department of State Health Services shall submit replacement mechanisms to comply with this subchapter and the requirements of Chapter 37, Subchapter T of this title by June 1, 2008.

§336.1127. Long-term Care and Maintenance Requirements.

(a) Unless otherwise provided by the agency, each licensee licensed in accordance with this part for disposal of by-product material shall make payments into the Perpetual Care Account in amounts specified by the agency. The agency shall make such determinations on a case-by-case basis.

(b) The final disposition of by-product material should be such that the need for ongoing active maintenance is eliminated to the maximum extent practicable.

(c) A minimum charge of $250,000 (1978 dollars) or more, if determined by the agency, must be paid into the Perpetual Care Account to cover the costs of long-term care and maintenance. The total charge must be paid prior to the termination of a license. With agency approval, the charge may be paid in installments. The total or unpaid portion of the charge must be covered during the term of the license by additional security meeting the requirements of §336.1125 of this title (relating to Financial Security Requirements). If site surveillance, control, or maintenance requirements at a particular site are determined, on the basis of a site-specific evaluation, to be significantly greater (for example, if fencing or monitoring is determined to be necessary), the agency may specify a higher charge. The total charge must be such that, with an assumed 2.0% annual real interest rate, the collected funds will yield interest in an amount sufficient to cover the annual costs of site care, surveillance, and where necessary, maintenance. Prior to actual payment, the total charge will be adjusted annually for inflation. The inflation rate to be used is that indicated by the change in the Consumer Price Index published by the United States Department of Labor, Bureau of Labor Statistics.

(d) The requirements of this section apply only to those sites whose ownership is subject to being transferred to the state or the federal government. The total amount of funds collected by the agency in accordance with this section must be transferred to the federal government if title and custody of the by-product material disposal site is transferred to the federal government upon termination of the license.

§336.1129. Technical Requirements.

(a) By-product material handling and disposal systems must be designed to accommodate full-capacity production over the lifetime of the facility. When later expansion of systems or operations may be likely, capability of the disposal system to be modified to accommodate increased quantities without degradation in long-term stability and other performance factors must be evaluated.

(b) In selecting among alternative by-product material disposal sites or judging the adequacy of existing sites, the following site features which would assure meeting the broad objective of isolating the tailings and associated contaminants without ongoing active maintenance must be considered:

(1) remoteness from populated areas;

(2) hydrogeologic and other environmental conditions conducive to continued immobilization and isolation of contaminants from usable groundwater sources; and

(3) potential for minimizing erosion, disturbance, and dispersion by natural forces over the long term.

(c) The site selection process must be an optimization to the maximum extent reasonably achievable in terms of these site features.

(d) In the selection of disposal sites, primary emphasis must be given to isolation of the by-product material, a matter having long-term impacts, as opposed to consideration only of short-term convenience or benefits (e.g., minimization of transportation of land acquisition costs). While isolation of by-product material will also be a function of both site and engineering design, overriding consideration must be given to siting features.

(e) By-product material should be disposed of in a manner such that no active maintenance is required to preserve conditions of the site.

(f) The applicant's environmental report must evaluate alternative sites and disposal methods and shall consider disposal of by-product material by placement below grade. Where full below grade burial is not practicable, the size of retention structures, and size and steepness of slopes associated with exposed embankments must be minimized by excavation to the maximum extent reasonably achievable or appropriate given the geologic and hydrologic conditions at a site. In these cases, it must be demonstrated that an above grade disposal program will provide reasonably equivalent isolation of the by-product material from natural erosional forces.

(g) To avoid proliferation of small waste disposal sites and thereby reduce perpetual surveillance obligations, by-product material from in situ extraction operations, such as residues from solution evaporation or contaminated control processes, and wastes from small remote above ground extraction operations must be disposed of at existing large mill tailings disposal sites; unless, considering the nature of the wastes, such as their volume and specific activity, and the costs and environmental impacts of transporting the wastes to a large disposal site, such offsite disposal is demonstrated to be impracticable or the advantages of onsite burial clearly outweigh the benefits of reducing the perpetual surveillance obligations.

(h) The following site and design requirements must be adhered to whether by-product material is disposed of above or below grade:

(1) the upstream rainfall catchment areas must be minimized to decrease erosion potential by flooding that could erode or wash out sections of the by-product material disposal area;

(2) the topographic features must provide good wind protection;

(3) the embankment and cover slopes must be relatively flat after final stabilization to minimize erosion potential and to provide conservative factors of safety assuring long term stability. The objective should be to contour final slopes to grades that are as close as possible to those that would be provided if by-product material was disposed of below grade. Slopes must not be steeper than 5 horizontal to 1 vertical (5h:1v), except as specifically authorized by the agency. Where steeper slopes are proposed, reasons why a slope steeper than 5h:1v would be as equally resistant to erosion shall be provided, and compensating factors and conditions that make such slopes acceptable shall be identified;

(4) a full self-sustaining vegetative cover must be established or rock cover employed to reduce wind and water erosion to negligible levels;

(5) where a full vegetative cover is not likely to be self-sustaining due to climatic conditions, such as in semi-arid and arid regions, rock cover shall be employed on slopes of the impoundment system. The agency may consider relaxing this requirement for extremely gentle slopes, such as those that may exist on the top of the pile;

(6) the following factors must be considered in establishing the final rock cover design to avoid displacement of rock particles by human and animal traffic or by natural processes, and to preclude undercutting and piping:

(A) shape, size, composition, gradation of rock particles (excepting bedding material, average particles size must be at least cobble size or greater);

(B) rock cover thickness and zoning of particles by size; and

(C) steepness of underlying slopes.

(7) individual rock fragments must be dense, sound, and resistant to abrasion, and shall be free from cracks, seams, and other defects that would tend to unduly increase their destruction by erosion and weathering action. Local rock materials are permissible provided the characteristics under local climatic conditions indicate similar long-term performance as a protective layer. Weak, friable, or laminated aggregate may not be used;

(8) rock covering of slopes may not be required where top covers are very thick (on the order of 10 m or greater); impoundment slopes are very gentle (on the order of 10h:1v or less); bulk cover materials have inherently favorable erosion resistance characteristics; there is negligible drainage catchment area upstream of the pile; and there is good wind protection;

(9) all impoundment surfaces must be contoured to avoid areas of concentrated surface runoff or abrupt or sharp changes in slope gradient. In addition to rock cover on slopes, areas toward which surface runoff might be directed must be well protected with substantial rock cover (riprap). In addition to providing for stability of the impoundment system itself, overall stability, erosion potential, and geomorphology of surrounding terrain must be evaluated to assure that there are no ongoing or potential processes, such as gully erosion, which would lead to impoundment instability;

(10) the impoundment must not be located near a capable fault that could cause a maximum credible earthquake larger than that which the impoundment could reasonably be expected to withstand; and

(11) the impoundment should be designed to incorporate features that will promote deposition. Design features that promote deposition of sediment suspended in any runoff which flows into the impoundment area might be utilized. The object of such a design feature would be to enhance the thickness of cover over time.

(i) The following groundwater protection requirements and those in subsections (j) and (k) of this section and §336.1133 of this title (relating to Maximum Values for Use in Groundwater Protection) apply during operations and until closure is completed. Groundwater monitoring to comply with these standards is required by subsections (bb) and (cc) of this section.

(1) The primary groundwater protection standard is a design standard for surface impoundments used to manage by-product material. Unless exempted under subsection (i)(3) of this section, surface impoundments (except for an existing portion) must have a liner that is designed, constructed, and installed to prevent any migration of wastes out of the impoundment to the adjacent subsurface soil, groundwater, or surface water at any time during the active life (including the closure period) of the impoundment. If the liner is constructed of materials that may allow wastes to migrate into the liner during the active life of the facility, impoundment closure shall include removal or decontamination of all waste residues, contaminated containment system components (liners, etc.), contaminated subsoils, and structures

and equipment contaminated with waste and leachate. For impoundments that will be closed with the liner material left in place, the liner must be constructed of materials that can prevent wastes from migrating into the liner during the active life of the facility.

(2) The liner required by paragraph (1) of this subsection must be:

(A) constructed of materials that have appropriate chemical properties and sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydrogeologic forces), physical contact with the waste or leachate to which they are exposed, climatic conditions, the stress of installation, and the stress of daily operation;

(B) placed upon a foundation or base capable of providing support to the liner and resistance to pressure gradients above and below the liner to prevent failure of the liner due to settlement, compression, or uplift; and

(C) installed to cover all surrounding earth likely to be in contact with the wastes or leachate.

(3) The applicant or licensee may be exempted from the requirements of paragraph (1) of this subsection if the agency finds, based on a demonstration by the applicant or licensee, that alternate design and operating practices, including the closure plan, together with site characteristics will prevent the migration of any hazardous constituents into groundwater or surface water at any future time. In deciding whether to grant an exemption, the agency will consider:

(A) the nature and quantity of the wastes;

(B) the proposed alternate design and operation;

(C) the hydrogeologic setting of the facility, including the attenuative capacity and thickness of the liners and soils present between the impoundment and groundwater or surface water; and

(D) all other factors that would influence the quality and mobility of the leachate produced and the potential for it to migrate to groundwater or surface water.

(4) A surface impoundment must be designed, constructed, maintained, and operated to prevent overtopping resulting from normal or abnormal operations, overfilling, wind and wave actions, rainfall, or run-off; from malfunctions of level controllers, alarms, and other equipment; and from human error.

(5) When dikes are used to form the surface impoundment, the dikes must be designed, constructed, and maintained with sufficient structural integrity to prevent massive failure of the dikes. In ensuring structural integrity, it must not be presumed that the liner system will function without leakage during the active life of the impoundment.

(j) By-product materials must be managed to conform to the following secondary groundwater protection requirements.

(1) Hazardous constituents, as defined in §336.1105(16) of this title (relating to Definitions), entering the groundwater from a licensed site must not exceed the specified concentration limits in the uppermost aquifer beyond the point of compliance during the compliance period.

(2) Specified concentration limits are those limits established by the agency as indicated in paragraph (7) of this subsection.

(3) The agency will also establish the point of compliance and compliance period on a site-specific basis through license conditions and orders.

(4) When the detection monitoring established under subsections (bb) and (cc) of this section indicates leakage of hazardous constituents from the disposal area, the agency will perform the following:

(A) identify hazardous constituents;

(B) establish concentration limits;

(C) set the compliance period; and

(D) may adjust the point of compliance if needed in accordance with developed data and site information regarding the flow of groundwater or contaminants.

(5) Even when constituents meet all three tests in the definition of hazardous constituent, the agency may exclude a detected constituent from the set of hazardous constituents on a site-specific basis if it finds that the constituent is not capable of posing a substantial present or potential hazard to human health or the environment. In deciding whether to exclude constituents, the agency will consider the following:

(A) potential adverse effects on groundwater quality, considering the following:

(i) physical and chemical characteristics of the waste in the licensed site, including its potential for migration;

(ii) hydrogeological characteristics of the licensed site and surrounding land;

(iii) quantity of groundwater and the direction of groundwater flow;

(iv) proximity of groundwater users and groundwater withdrawal rates;

(v) current and future uses of groundwater in the area;

(vi) existing quality of groundwater, including other sources of contamination and cumulative impact on the groundwater quality;

(vii) potential for human health risks caused by human exposure to waste constituents;

(viii) potential damage to wildlife, crops, vegetation, and physical structures caused by exposure to waste constituents; and

(ix) persistence and permanence of potential adverse effects; and

(B) potential adverse effects on quality of hydraulically-connected surface water, considering the:

(i) volume and physical and chemical characteristics of the by-product material in the licensed site;

(ii) hydrogeological characteristics of the licensed site and surrounding land;

(iii) quantity and quality of groundwater and the direction of groundwater flow;

(iv) patterns of rainfall in the region;

(v) proximity of the licensed site to surface waters;

(vi) current and future uses of surface waters in the area and any water quality standards established for those surface waters;

(vii) existing quality of surface water, including potential impacts from other sources of contamination and the cumulative impact on surface water quality;

(viii) potential for human health risks caused by human exposure to waste constituents;

(ix) potential damage to wildlife, crops, vegetation, and physical structures caused by exposure to waste constituents; and

(x) persistence and permanence of the potential adverse effects.

(6) In making any determinations under paragraphs (5) and (8) of this subsection about the use of groundwater in the area around the facility, the agency will consider any identification of underground sources of drinking water and exempted aquifers made by the United States Environmental Protection Agency (EPA) and the commission under Chapter 331 of this title.

(7) At the point of compliance, the concentration of a hazardous constituent may not exceed the following:

(A) the agency approved background concentration in the groundwater of the constituents listed in 10 Code of Federal Regulations (CFR) 40, Appendix A, Criterion 13;

(B) the respective value given in §336.1133 of this title if the constituent is listed in the table and if the background level of the constituent is below the value listed; or

(C) an alternate concentration limit established by the agency.

(8) Alternate concentration limits to background concentration or to the drinking water limits in §336.1133 of this title that present no significant hazard may be proposed by licensees for agency consideration. Licensees must provide the basis for any proposed limits including consideration of practicable corrective actions, evidence that limits are as low as reasonably achievable, and information on the factors the agency shall consider. The agency may establish a site-specific alternate concentration limit for a hazardous constituent, as provided in paragraph (7) of this subsection, if it finds that the proposed limit is as low as reasonably achievable, after considering practicable corrective actions, and that the constituent will not pose a substantial present or potential hazard to human health or the environment as long as the alternate concentration limit is not exceeded. In making the present and potential hazard finding, the agency will consider the factors listed in paragraph (4) of this subsection.

(k) If the groundwater protection standards established under subsection (i) of this section are exceeded at a licensed site, a corrective action program must be put into operation as soon as is practicable, and in no event later than 18 months after the agency finds that the standards have been exceeded. The licensee must submit the proposed corrective action program and supporting rationale for executive director approval prior to putting the program into operation, unless otherwise directed by the executive director. The licensee's proposed program must address removing or treating in place any hazardous constituents that exceed concentration limits in groundwater between the point of compliance and downgradient licensed site boundary. The licensee must continue corrective action measures to the extent necessary to achieve and maintain compliance with the groundwater protection standard. The executive director will determine when the licensee may terminate corrective action measures based on data from the groundwater monitoring program and other information that provides reasonable assurance that the groundwater protection standard will not be exceeded.

(l) In developing and conducting groundwater protection programs, applicants and licensees must also consider the following:

(1) installation of bottom liners. Where synthetic liners are used, a leakage-detection system must be installed immediately below the liner to ensure detection of any major failures. This is in addition to the groundwater monitoring program conducted as provided in subsection (cc) of this section. Where clay liners are proposed or relatively thin, in situ clay soils are to be relied upon for seepage control, tests must be conducted with representative tailings solutions and clay materials to confirm that no significant deterioration of permeability or stability properties will occur with continuous exposure of clay to by-product material solutions. Tests must be run for a sufficient period of time to reveal any effects that may occur;

(2) mill process designs that provide the maximum practicable recycle of solutions and conservation of water to reduce the net input of liquid to the by-product material impoundment;

(3) dewatering of by-product material solutions by process devices and/or in situ drainage systems. At new sites, by-product material solutions must be dewatered by a drainage system installed at the bottom of the impoundment to lower the phreatic surface and reduce the driving head of seepage, unless tests show by-product material solutions are not amenable to such a system. Where in situ dewatering is to be conducted, the impoundment bottom must be graded to assure that the drains are at a low point. The drains must be protected by suitable filter materials to assure that drains remain free-running. The drainage system must also be adequately sized to assure good drainage; and

(4) neutralization to promote immobilization of hazardous constituents.

(m) Technical specifications must be prepared for installation of seepage control systems. A quality assurance, testing, and inspection program, which includes supervision by a qualified engineer or scientist, must be established to assure that specifications are met. If adverse groundwater impacts or conditions conducive to adverse groundwater impacts occur due to seepage, action must be taken to alleviate the impacts or conditions and restore groundwater quality to levels consistent with those before operations began. The specific seepage control and groundwater protection method, or combination of methods, to be used must be worked out on a site-specific basis.

(n) In support of a by-product material disposal system proposal, the applicant/licensee must supply the following information:

(1) the chemical and radioactive characteristics of the waste solutions;

(2) the characteristics of the underlying soil and geologic formations particularly as they will control transport of contaminants and solutions. This must include detailed information concerning extent, thickness, uniformity, shape, and orientation of underlying strata. Hydraulic gradients and conductivities of the various formations must be determined. This information must be gathered by borings and field survey methods taken within the proposed impoundment area and in surrounding areas where contaminants might migrate to groundwater. The information gathered on boreholes must include both geologic and geophysical logs in sufficient number and degree of sophistication to allow determining significant discontinuities, fractures, and channeled deposits of high hydraulic conductivity. If field survey methods are used, they should be in addition to and calibrated with borehole logging. Hydrologic parameters such as permeability must not be determined on the basis of laboratory analysis of samples alone. A sufficient amount of field testing (e.g., pump tests) must be conducted to assure actual field properties are adequately understood. Testing must be conducted to make possible estimates of chemisorption attenuation properties of underlying soil and rock; and

(3) location, extent, quality, capacity, and current uses of any groundwater at and near the site.

(o) If ore is stockpiled, methods must be used to minimize penetration of radionuclides and other substances into underlying soils.

(p) In disposing of by-product material, licensees must place an earthen cover over the by-product material at the end of the facility's operations and shall close the waste disposal area in accordance with a design that provides reasonable assurance of control of radiological hazards to the following:

(1) be effective for 1,000 years to the extent reasonably achievable and, in any case, for at least 200 years; and

(2) limit releases of radon-222 from uranium by-product materials and radon-220 from thorium by-product materials to the atmosphere so as not to exceed an average release rate of 20 picocuries per square meter per second (pCi/m^2s) to the extent practicable throughout the effective design life determined in accordance with paragraph (1) of this subsection. This average applies to the entire surface of each disposal area over a period of at least one year, but a short period compared to 100 years. Radon will come from both by-product materials and cover materials. Radon emissions from cover materials should be estimated as part of developing a closure plan for each site. The standard, however, applies only to emissions from by-product materials to the atmosphere.

(q) In computing required by-product material cover thicknesses, moisture in soils in excess of amounts found normally in similar soils in similar circumstances may not be considered. Direct gamma exposure from the by-product material should be reduced to background levels. The effects of any thin synthetic layer may not be taken into account in determining the calculated radon exhalation level. Cover may not include materials that contain elevated levels of radium. Soils used for near-surface cover must be essentially the same, as far as radioactivity is concerned, as that of surrounding surface soils. If non-soil materials are proposed as cover materials, the licensee must demonstrate that such materials will not crack or degrade by differential settlement, weathering, or other mechanisms over the long term.

(r) As soon as reasonably achievable after emplacement of the final cover to limit releases of radon-222 from uranium by-product material and prior to placement of erosion protection barriers of other features necessary for long-term control of the tailings, the licensee must verify through appropriate testing and analysis that the design and construction of the final radon barrier is effective in limiting releases of radon-222 to a level not exceeding 20pCi/m^2s averaged over the entire pile or impoundment using the procedures described in Appendix B, method 115 of 40 CFR Part 61, or another method of verification approved by the agency as being at least as effective in demonstrating the effectiveness of the final radon barrier.

(s) When phased emplacement of the final radon barrier is included in the applicable reclamation plan, as defined in §336.1105(25) of this title, the verification of radon-222 release rates required in subsection (dd) of this section must be conducted for each portion of the pile or impoundment as the final radon barrier for that portion is emplaced.

(t) Within 90 days of the completion of all testing and analysis relevant to the required verification in subsection (dd)(3) and (4) of this section, the uranium recovery licensee must report to the agency the results detailing the actions taken to verify that levels of release of radon-222 do not exceed 20 pCi/m^2s when averaged over the entire pile or impoundment. The licensee must maintain records documenting the source of input parameters, including the results of all measurements on which they are based, the calculations and/or analytical methods used to derive values for input parameters, and the procedure used to determine compliance. These records must be maintained until termination of the license and shall be kept in a form suitable for transfer to the custodial agency at the time of transfer of the site to the state or federal government in accordance with §336.1131 of this title (relating to Land Ownership of By-Product Material Disposal Sites).

(u) Near-surface cover materials may not include waste, rock, or other materials that contain elevated levels of radium. Soils used for near-surface cover must be essentially the same, as far as radioactivity is concerned, as surrounding surface soils. This is to ensure that surface radon exhalation is not significantly above background because of the cover material itself.

(v) The design requirements for longevity and control of radon releases apply to any portion of a licensed and/or disposal site unless such portion contains a concentration of radium in land averaged over areas of 100 square meters (m^2), that, as a result of by-product material, does not exceed the background level by more than:

(1) 5 picocuries per gram (pCi/g) of radium-226, or in the case of thorium by-product material, radium-228, averaged over the first 15 centimeters (cm) below the surface; and

(2) 15 pCi/g of radium-226, or in the case of thorium by-product material, radium-228, averaged over 15-cm thick layers more than 15 cm below surface.

(w) The licensee must also address the nonradiological hazards associated with the waste in planning and implementing closure. The licensee must ensure that disposal areas are closed in a manner that minimizes the need for further maintenance. To the extent necessary to prevent threats to human health and the environment, the licensee shall control, minimize, or eliminate post-closure escape of nonradiological hazardous constituents, leachate, contaminated rainwater, or waste decomposition products to groundwater or surface waters or to the atmosphere.

(x) For impoundments containing uranium by-product materials, the final radon barrier shall be completed as expeditiously as practicable considering technological feasibility after the pile or impoundment ceases operation in accordance with a written reclamation plan, as defined in §336.1105(25) of this title, approved by the agency, by license amendment. (The term "As expeditiously as practicable considering technological feasibility" includes "Factors beyond the control of the licensee.") Deadlines for completion of the final radon barrier and applicable interim milestones shall be established as license conditions. Applicable interim milestones may include, but are not limited to, the retrieval of windblown by-product material and placement on the pile and the interim stabilization of the by-product material (including dewatering or the removal of freestanding liquids and recontouring). The placement of erosion protection barriers or other features necessary for long-term control of the by-product material shall also be completed in a timely manner in accordance with a written reclamation plan approved by the agency by license amendment.

(y) The agency may approve by license amendment a licensee's request to extend the time for performance of milestones related to emplacement of the final radon barrier if, after providing an opportunity for public participation, the agency finds that the licensee has adequately demonstrated in the manner required in subsection (r) of this section that releases of radon-222 do not exceed an average of 20 pCi/m^2s. If the delay is approved on the basis that the radon releases do not exceed 20 pCi/m^2s, a verification of radon levels, as required by subsection (r) of this section, shall be made annually during the period of delay. In addition, once the agency has established the date in the reclamation plan for the milestone for completion of the final radon

barrier, the agency may by license amendment extend that date based on cost if, after providing an opportunity for public participation, the agency finds that the licensee is making good faith efforts to emplace the final radon barrier, the delay is consistent with the definition of "Available technology," and the radon releases caused by the delay will not result in a significant incremental risk to the public health.

(z) The agency may authorize by license amendment, upon licensee request, a portion of the impoundment to accept uranium by-product material, or such materials that are similar in physical, chemical, and radiological characteristics to the uranium mill tailings and associated wastes already in the pile or impoundment, from other sources during the closure process. No such authorization will be made if it results in a delay or impediment to emplacement of the final radon barrier over the remainder of the impoundment in a manner that will achieve levels of radon-222 releases not exceeding 20 pCi/m^2s averaged over the entire impoundment. The verification required in subsection (r) of this section may be completed with a portion of the impoundment being used for further disposal if the agency makes a final finding that the impoundment will continue to achieve a level of radon-222 release not exceeding 20 pCi/m^2s averaged over the entire impoundment. After the final radon barrier is complete except for the continuing disposal area, only by-product material will be authorized for disposal, and the disposal will be limited to the specified existing disposal area. This authorization by license amendment will only be made after providing opportunity for public participation. Reclamation of the disposal area, as appropriate, must be completed in a timely manner after disposal operations cease in accordance with subsection (p) of this section. These actions are not required to be complete as part of meeting the deadline for final radon barrier construction.

(aa) The licensee's closure plan must provide reasonable assurance that institutional control will be provided for the length of time found necessary by the agency to ensure the requirements of subsection (p) of this section are met.

(bb) Prior to any major site construction, a preoperational monitoring program must be conducted for one full year to provide complete baseline data on the site and its environs. Throughout the construction and operating phases of the project, an operational monitoring program must be conducted to measure or evaluate compliance with applicable standards and rules; to evaluate performance of control systems and procedures; to evaluate environmental impacts of operation; and to detect potential long-term effects.

(cc) The licensee shall establish a detection monitoring program needed for the agency to set the site-specific groundwater protection standards in subsection (j)(4) of this section. For all monitoring under this paragraph, the licensee or applicant will propose, as license conditions for agency approval, which constituents are to be monitored on a site-specific basis. The data and information must provide a sufficient basis to identify those hazardous constituents that require concentration limit standards and to enable the agency to set the limits for those constituents and compliance period. They may provide the basis for adjustments to the point of compliance. The detection monitoring program must be in place when specified by the agency in orders or license conditions. Once groundwater protection standards have been established in accordance with subsection (j)(4) of this section, the licensee shall establish and implement a compliance monitoring program. In conjunction with a corrective action program, the licensee shall establish and implement a corrective action monitoring program to demonstrate the effectiveness of the corrective actions. Any monitoring program required by this subsection may be based on existing monitoring programs to the extent the existing programs can meet the stated objective for the program.

(dd) Systems must be designed and operated so that all airborne effluent releases are as low as is reasonably achievable. The primary means of accomplishing this must be by means of emission controls. Institutional controls, such as extending the site boundary and exclusion area, may be employed to ensure that offsite exposure limits are met, but only after all practicable measures have been taken to control emissions at the source.

(1) During operations and prior to closure, radiation doses from radon emissions from surface impoundments of by-product materials must be kept as low as is reasonably achievable.

(2) Checks must be made and logged hourly of all parameters which determine the efficiency of emission control equipment operation. It must be determined whether or not conditions are within a range prescribed to ensure that the equipment is operating consistently near peak efficiency. Corrective action must be taken when performance is outside of prescribed ranges. Effluent control devices must be operative at all times during drying and packaging operations and whenever air is exhausting from the uranium dryer stack. Drying and packaging operations must terminate when controls are inoperative. When checks indicate the equipment is not operating within the range prescribed for peak efficiency, actions must be taken to restore parameters to the prescribed range. When this cannot be done without shutdown and repairs, drying and packaging operations must cease as soon as practicable. Operations may not be restarted after cessation due to off-normal performance until needed corrective actions have been identified and implemented. All such cessations, corrective actions, and re-starts must be reported to the executive director in writing within ten days of the subsequent restart.

(3) To control dusting from by-product material, that portion not covered by standing liquids must be wetted or chemically stabilized to prevent or minimize blowing and dusting to the maximum extent reasonably achievable. This requirement may be relaxed if by-product materials are effectively sheltered from wind, as in the case of below-grade disposal. Consideration must be given in planning by-product material disposal programs to methods for phased covering and reclamation of by-product material impoundments. To control dusting from diffuse sources, applicants/licensees must develop written operating procedures specifying the methods of control that will be utilized.

(4) Uranium recovery facility operations producing or involving thorium by-product material must be conducted in such a manner as to provide reasonable assurance that the annual dose equivalent does not exceed 25 millirems (mrem) to the whole body, 75 mrem to the thyroid, and 25 mrem to any other organ of any member of the public as a result of exposures to the planned discharge of radioactive materials to the general environment, radon-220 and its daughters excepted.

(5) By-product materials must be managed so as to conform to the applicable provisions of 40 CFR Part 440, as codified on January 1, 1983.

(ee) Licensees/applicants may propose alternatives to the specific requirements in §336.1125 of this title (relating to Financial Security Requirements), §336.1127 of this title (relating to Long-Term Care and Maintenance Requirements), §336.1129 of this title (relating to Technical Requirements) and §336.1131 of this title (relating to Land Ownership of By-Product Material Disposal Sites). The alternative proposals may take into account local or regional conditions including geology, topography, hydrology, and meteorology.

(ff) The agency may find that the proposed alternatives meet the agency's requirements if the alternatives will achieve a level of stabilization and containment of the sites concerned and a level of protection for the public health and safety and the environment from radio-

logical and nonradiological hazards associated with the sites, which is equivalent to, to the extent practicable, or more stringent than the level that would be achieved by the requirements of §§336.1125, 336.1127, 336.1129 and 336.1131 of this title and the standards promulgated by EPA in 40 CFR Part 192, Subparts D and E.

(gg) All site-specific licensing decisions based on the criteria in §§336.1125, 336.1127, 336.1129 and 336.1131 of this title, or alternatives proposed by licensees or applicants must take into account the risk to the public health and safety and the environment with due consideration to the economic costs involved and any other factors the agency determines to be appropriate.

(hh) Any proposed alternatives to the specific requirements in §§336.1125, 336.1127, 336.1129 and 336.1131 of this title must meet the requirements of 10 CFR §150.31(d).

(ii) No new site may be located in a 100-year floodplain or wetland as defined in "Floodplain Management Guidelines for Implementing Executive Order 11988."

§336.1131. Land Ownership of By-product Material Disposal Sites.

(a) These criteria relating to ownership of by-product material and their disposal sites apply to all licenses terminated, issued, or renewed after November 8, 1981.

(b) Unless exempted by the United States Nuclear Regulatory Commission (NRC), title to land (including any affected interests therein) that is used for the disposal of by-product material or that is essential to ensure the long-term stability of the disposal site and title to the by-product material must be transferred to the State of Texas or the United States prior to the termination of the license. Material and land transferred must be transferred without cost to the State of Texas or the United States. In cases where no ongoing site surveillance will be required, surface land ownership transfer requirements may be waived. For licenses issued before November 8, 1981, NRC may take into account the status of the ownership of the land and interests therein, and the ability of a licensee to transfer title and custody thereof to the State.

(c) Any uranium recovery facility license must contain terms and conditions as the agency determines necessary to assure that, prior to termination of the license, the licensee will comply with ownership requirements of this section for sites used for tailings disposal.

(d) For surface impoundments only, the applicant/licensee shall demonstrate a serious effort to obtain severed mineral rights and shall, in the event that fee simple title including all mineral rights cannot be obtained, provide notification in local public land records of the fact that the land is being used for the disposal of radioactive material and is subject to an NRC license prohibiting the disruption and disturbance of the tailings.

(e) If NRC, subsequent to title transfer, determines that use of the surface or subsurface estates, or both, of the land transferred to the state or federal government will not endanger the public health and safety or the environment, NRC may permit the use of the surface or subsurface estates, or both, of such land in a manner consistent with the provisions of this section. If NRC permits the use of such land, it will provide the person who transferred the land with the first refusal with respect to the use of such land.

§336.1133. Maximum Values for Use in Groundwater Protection.

The following is a list of the maximum concentration values to be used for groundwater protection.
Figure: 30 TAC §336.1133

§336.1135. Construction Activities.

An applicant may commence construction activities before issuance of a license, at the applicant's own risk, under the following conditions:

(1) the applicant has completed preoperational monitoring provided under §336.1129(bb) of this title (relating to Technical Requirements);

(2) the executive director has issued an environmental analysis and final draft license with recommendation to approve the application under §281.21 of this title (relating to Draft Permit, Technical Summary, Fact Sheet, and Compliance History);

(3) the applicant may not receive, store, possess, receive or dispose of by-product material without a license from the commission authorizing the activity;

(4) the agency may inspect and observe the construction activities;

(5) the applicant must cease construction activities when directed by the executive director to do so; and

(6) the commencement of construction activities may not be considered as a factor in determining whether to issue a license.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703841
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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SUBCHAPTER M. LICENSING OF RADIOACTIVE SUBSTANCES PROCESSING AND STORAGE FACILITIES

30 TAC §§336.1201, 336.1203, 336.1205, 336.1207, 336.1209, 336.1211, 336.1213, 336.1215, 336.1217, 336.1219, 336.1221, 336.1223, 336.1225, 336.1227, 336.1229, 336.1231, 336.1233, 336.1235

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the state. The new sections are also proposed under Texas Health and Safety Code, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation (also known as the Texas Radiation Control Act); §401.011, concerning Radiation Control Agency, which authorizes the commission to regulate and license the disposal of radioactive substances, the processing or storage of low-level radioactive waste or naturally occurring radioactive material, the recovery or processing of source material, and the processing of by-product material; §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes

the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, concerning Licensing and Registration rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.202, concerning Regulation of Low-Level Radioactive Waste Disposal, which authorizes the commission to regulate commercial processing and disposal of low-level radioactive waste; §401.262, concerning Management of Certain By-Product Material, which provides the commission authority to regulate by-product storage and processing facilities; and §401.412, concerning Commission Licensing Authority, which authorizes the commission to issue licenses for the disposal of radioactive substances.

The proposed new sections implement Texas Health and Safety Code, as amended by SB 1604, 80th Legislature, 2007, §§401.011, 401.051, 401.103, 401.104, 401.151, 401.202, 401.262, 401.2625, and 402.412.

§336.1201. Purpose and Scope.

(a) This section establishes the requirements for management of commercial radioactive substances processing and storage facilities, the procedures and criteria for the issuance of licenses to receive, possess, transport, store, and process radioactive substances from other persons, and the terms and conditions upon which the agency may issue such licenses.

(b) In addition to the requirements of this subchapter, all licensees, unless otherwise specified, are subject to the requirements of Subchapters A - E and G of this chapter (relating to General Provisions; Radioactive Substance Fees; General Disposal Requirements; Standards for Protection Against Radiation; Notices, Instructions, and Reports to Workers and Inspections; and Decommissioning Standards).

§336.1203. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Commencement of major construction--Any major structural erection or major alterations to existing structures, or other substantial action that would change the facility design or site for the purpose of establishing a radioactive substances processing or storage facility. The term does not mean the acquisition of existing structures or minor changes thereto.

(2) Decommissioning--The final activities carried out at a radioactive substances processing or storage site after completion of processing operations to remove safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and/or termination of the license. Such activities must include:

(A) disposing of all radioactive substances at a licensed radioactive waste disposal site;

(B) dismantling or decontaminating site structures;

(C) decontaminating site surfaces and remaining equipment; and

(D) conducting final closure surveys, decontamination, and reclamation of the site.

(3) Disposal--Isolation or removal of radioactive substances from mankind and his environment. The term does not include emissions and discharges under rules of the agency.

(4) Engineered barriers--Man-made devices to contain or limit the potential movement of radioactive material, which might result from spills or other accidents.

(5) Floodplain--The lowland and relatively flat areas adjoining inland and coastal waters, including flood prone areas of offshore islands.

(6) Local government--A county, an incorporated city or town, a special district, or other political subdivision of the state.

(7) Major aquifer--An aquifer that yields large quantities of water in a comparatively large area of the state. Major aquifers are located in the following formations: Ogallala, Alluvium and Bolsom Deposits, Edwards-Trinity (Plateau), Edwards (Balcones Fault Zone - San Antonio Region), Edwards (Balcones Fault Zone - Austin Region), Trinity Group, Carrizo-Wilcox, and Gulf Coast.

(8) Natural barriers--The natural characteristics of a site or surface and subsurface composition that serves to impede the movement of radioactive material. Natural barriers may include, for example, the location of a facility remote from an aquifer, or the sorptive capability of the soil surrounding a facility.

(9) Processing--The storage, extraction of materials, transfer, volume reduction, compaction, incineration, solidification, or other separation and preparation of radioactive substances from other persons for reuse or disposal, including any treatment or activity that renders the waste less hazardous, safer for transport, or amenable to recovery, storage, or disposal.

(10) Radioactive substances processing facility--A facility where radioactive substances received from other persons are processed and/or repackaged according to United States Department of Transportation (DOT) regulations.

(11) Radioactive substances storage facility--A facility where radioactive substances received from other persons are stored while awaiting shipment to a licensed radioactive substances processing or disposal facility.

(12) Reconnaissance level information--Any information or analysis that can be retrieved or generated without the performance of new comprehensive site-specific investigations. Reconnaissance level information includes, but is not limited to, relevant published scientific literature; drilling records required by state agencies, such as the Railroad Commission of Texas, the Texas Commission on Environmental Quality, and the Texas Natural Resources Information System; and reports of governmental agencies.

(13) Site--The real property, including the buffer zone, on which a radioactive substances processing or storage facility may be located.

(14) Site monitoring--The procedures for the monitoring of the site and environment to assess quality of site operations and performance and to detect and quantify levels and types of radioactivity and chemicals in the environment. It includes preoperational, operational, and license termination phases.

(15) Site operations--The routine day-to-day activities carried out at the site for the receipt, processing, and storage of radioactive substances.

(16) Site suitability--The capability of the various characteristics of a processing or storage facility or site to safely contain the radioactive substances expected to be present at the site.

(17) Sole source aquifer--The aquifer that is the sole or principal source of drinking water for an area designated under the Safe Drinking Water Act of 1974, 42 United States Code Annotated 300f, *et seq.*

(18) Waste processing and storage categories--Radionuclides classified as follows:

(A) any one of seven groups into which radionuclides in normal form are classified, according to their toxicity and their relative potential hazard in transport, as specified in §336.1231 of this title (relating to Radioactive Substances Processing and Storage Categories of Radionuclides); and

(B) any radionuclide not specifically listed in one of the categories in §336.1231 of this title shall be assigned to one of the categories in accordance with §336.1231(b) of this title.

(19) Wetlands--Areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that, under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include playa lakes, swamps, marshes, bogs, and similar areas.

§336.1205. Activities Requiring License.

Except for persons exempted by this subchapter, no person may receive, possess, store or process radioactive substances from another person except as authorized in a specific license issued in accordance with this subchapter.

§336.1207. Radioactive Substances Processing and Storage Facility Classification.

(a) Radioactive substances processing and storage facilities are classified according to the radionuclides, other than sealed sources, received, possessed, or processed in each of the waste processing and storage categories, as defined in §336.1203 of this title (relating to Definitions) with all applicable provisions, except that, for the purposes of this section which apply to processing and storage of radioactive substances, Category IV must include waste processing and storage categories IV - VII. The total possession limit of each category of unsealed (dispersible) radionuclides for each class of facility is as follows:

Figure: 30 TAC §336.1207(a)

(b) Class III storage facilities are those in which the applicable possession limit of radioactive substances exceeds any limit of Class II storage facilities.

(c) Class III processing facilities are those in which the applicable possession limit of radioactive substances exceeds any limit of Class II processing facilities.

§336.1209. Exemptions.

(a) Sealed sources. Persons who receive, possess, or process sealed sources of radioactive material as radioactive waste from other persons are exempt from this section, provided that:

(1) encapsulated sources are tested upon receipt and determined to have less than 0.005 microcurie of removable contamination; and

(2) sealed sources of radioactive material remain in sealed form after receipt.

(b) Unsealed sources.

(1) Persons who receive, possess, or process sources of radioactive material in unsealed form as radioactive waste from other persons are exempt from this section provided that:

(A) the total radioactivity of all radioactive waste possessed at any one time does not exceed the applicable limits for Class I processing or storage facilities as described in §336.1207 of this title (relating to Radioactive Substances Processing and Storage Facility Classification); and

(B) the total volume of radioactive waste processed in any one year does not exceed 50 cubic feet.

(2) Persons who receive, possess, and store radioactive material in unsealed form as radioactive substances from other persons are exempt from this section provided that:

(A) the radioactive substance consists only of radiopharmaceutical residues resulting from radiopharmaceuticals manufactured, compounded, and supplied by those persons receiving the radiopharmaceutical residues as radioactive waste;

(B) the radioactive substance is held in storage for decay to background radiation levels; and

(C) the radioactive substances is not shipped to a radioactive waste processing or disposal facility.

(c) Radioactive material. A person who receives, possesses, and stores radioactive material as waste from sites owned and controlled by that same person is not considered to have received waste from other persons.

§336.1211. Filing Application for a Specific License.

Unless otherwise specified, an applicant for a license to receive, possess, or process radioactive substances from other persons is subject to the requirements in §336.205 of this title (relating to Application Requirements). The applicant shall also comply with the following additional filing requirements.

(1) The applicant for a license to receive, possess, or process radioactive substances from other persons shall submit seven copies of each license application or application for amendment and any supporting documents in a manner specified by the agency. Applications for issuance of licenses must include all general and specific technical requirements, financial information, and environmental requirements, if applicable, described in this section.

(2) Each application must clearly demonstrate how the requirements of this section and §§336.1213, 336.1215, and 336.1217 of this title (relating to Additional Environmental Requirements for Class III Facilities, Issuance of Licenses, Commencement of Major Construction, respectively) have been addressed.

(3) Applications for licenses will be processed in accordance with the requirements of Chapter 281 of this title (relating to Applications Processing).

(4) An applicant for a license under this section must include the following additional information in the application:

(A) identity of the applicant including the full name, address, telephone number, and description of the business(es) or occupation(s) of the applicant;

(B) the organizational structure of the applicant, both off-site and on-site, including a description of lines of authority and assignments of responsibilities, whether in the form of administrative directives, contract provisions, or otherwise;

(C) a description of past operations that the applicant has been involved in including any license limitations, suspensions or revocations of such licenses, and any other information that will allow the agency to assess the applicant's past operating history;

(D) the technical qualifications, including training and experience, of the applicant and members of the applicant's staff to engage in the proposed activities; and minimum training and experience requirements for personnel;

(E) a description of the personnel training and retraining program;

(F) a statement of need and a description of the proposed activities identifying:

(i) the location of the proposed site;

(ii) the character of the proposed activities;

(iii) the types, chemical and/or physical forms and quantities of radioactive substances to be received, possessed, and processed; and

(iv) the plans for use of the facility for purposes other than processing of radioactive substances;

(G) proposed time schedules for construction and receipt and processing of radioactive waste at the proposed facility;

(H) description of the site and accurate drawings of the facility including, but not limited to:

(i) construction;

(ii) foundation details;

(iii) ventilation;

(iv) plumbing and fire suppression systems;

(v) physical security system;

(vi) storage areas;

(vii) radioactive substances handling or processing areas;

(viii) proximity to creeks or culverts; and

(ix) soil types under the facility with respect to compatibility with foundation and structural design;

(I) a description that demonstrates that the site suitability characteristics will meet the following requirements:

(i) the overall hydrogeologic environment of the site, in combination with engineering design, must act to minimize and control potential migration of radioactive substances into surface water and groundwaters;

(ii) no new site may be located in a 100-year floodplain, as designated by the Commission, or a wetland; and

(iii) no new site may be located in the recharge area of a sole source aquifer or a major aquifer unless it can be demonstrated with reasonable assurance that the new site will be designed, constructed, operated, and closed without an unreasonable risk to the aquifer.

(J) minimum criteria for facility design and operation to include:

(i) the building used for processing radioactive wastes must have a minimum classification of Type II (111) in accordance with National Fire Protection Association 220 titled, "Standard Types of Building Construction;"

(I) buildings used for processing or storage of radioactive substances shall have ventilation and fire protection systems to minimize the release of radioactive materials into the soils, waters, and the atmosphere; and

(II) facilities and equipment for repackaging leaking and/or damaged containers must be provided.

(ii) the design and operation of the radioactive substances processing or storage facility must be such that:

(I) releases of non-radiological noxious materials from the facility are minimized; and

(II) radiation levels, concentrations, and potential exposures off-site due to airborne releases during operations are within the limits established in Subchapter D of this chapter and are maintained as low as reasonably achievable.

(iii) the design and operation of the radioactive substances processing or storage facility must be compatible with the objectives of the site closure and decommissioning plan;

(iv) the facility must be designed to confine spills. Independent and diverse engineered barriers must be provided, as necessary, to complement natural barriers in minimizing potential releases from the facility and in complying with this section;

(v) the location and construction of any new radioactive substances processing facility must have a buffer zone adequate to permit emergency measures to be implemented following accidents and to address airborne plume dispersions and, as a minimum, shall be such that:

(I) the active components of a Class II facility are located at least 30 meters from the nearest residence as of the date of the license application; and

(II) the active components of a Class III facility are located at least 30 meters from the nearest property not owned or occupied by the licensee.

(K) a flow diagram of radioactive substances processing operations;

(L) a description and accurate drawings of processing equipment and any required special handling techniques to be employed;

(M) a description of personnel monitoring methods, training, and procedures to be followed to keep employees from ingesting and inhaling radioactive materials, including a description of methods to keep the radiation exposure to levels as low as reasonably achievable;

(N) a description of the site monitoring program to include prelicense data and proposed operational monitoring programs for direct gamma radiation measurements and radioactive and chemical characteristics of the soils, groundwater, surface waters, and vegetation, as applicable;

(i) for radioactive substances storage facilities, the applicant shall address on-site air quality; and

(ii) for radioactive substances processing facilities, the applicant shall address on-site and off-site air quality;

(O) spill detection and cleanup plans for the licensed site and for associated transportation of radioactive material;

(P) an operating, safety, and emergency procedures manual that must provide detailed procedures for receiving, handling, storing, processing, and shipping radioactive substances;

(Q) for radioactive substances processing facilities, a description of the equipment to be installed to maintain control over maximum concentrations of radioactive materials in gaseous and liquid effluents produced during normal operations and the means to be employed for keeping levels of radioactive material in effluents to unrestricted areas as low as reasonably achievable and within the limits listed in Subchapter D of this chapter;

(R) methods of ultimate disposal and decommissioning; and

(S) the system for maintaining inventory of receipt, storage, and transfer of radioactive substances.

(T) an adequate operating, radiation safety, and emergency procedures manual; and

(U) a signed certification from the owner or owners of the real property on which radioactive substances are stored or processed acknowledging that:

(i) radioactive substances are stored or processed on the property with the consent of the property owner or owners; and

(ii) decommissioning of the site may be required even if the applicant or licensee is unable or fails to decommission the site as required by a license, rule or order of the commission.

§336.1213. Additional Environmental Requirements for Class III Facilities.

An application for a license for a class III processing or storage facility must include environmental information that may be based on reconnaissance level information when appropriate and addresses the following:

(1) description of present land uses and population distribution in the vicinity of the site:

(A) for radioactive substances storage facilities, the description must address properties adjacent to the site; and

(B) for radioactive substances processing facilities, the description must address properties adjacent to the site and shall include population distribution within a one-mile radius of the site;

(2) area/site suitability including geology, hydrology, and natural hazards. For radioactive substances processing facilities, area meteorology also must be addressed;

(3) site and project alternatives including alternative siting analysis;

(4) socioeconomic effects on surrounding communities of operation of the licensed activity and of associated transportation of radioactive material; and

(5) environmental effects of postulated accidents.

§336.1215. Issuance of Licenses.

(a) A license for a radioactive substances processing or storage facility may be issued if the agency finds reasonable assurance that:

(1) an application meets the requirements of the Texas Radiation Control Act and the rules of the agency;

(2) the proposed radioactive substances facility will be sited, designed, operated, decommissioned, and closed in accordance with this chapter;

(3) the issuance of the license will not be inimical to the health and safety of the public or the environment; and

(4) there is no reason to deny the license because of:

(A) any material false statement in the application or any statement of fact required under provisions of the Texas Radiation Control Act;

(B) conditions revealed by the application or statement of fact or any report, record, or inspection, or other means that would warrant the agency to refuse to grant a license on an application; or

(C) failure to clearly demonstrate how the requirements in this chapter have been addressed; and

(5) qualifications of the designated radiation safety officer (RSO) are adequate for the purpose requested in the application and include as a minimum:

(A) have earned at least a bachelor's degree in a physical or biological science, industrial hygiene, health physics, radiation protection, or engineering from an accredited college or university, or an equivalent combination of training and relevant experience, with two years of relevant experience equivalent to a year of academic study, from a uranium or mineral extraction/recovery, radioactive waste processing, or a radioactive waste or by-product material disposal facility;

(B) have at least one year of relevant experience, in addition to that used to meet the educational requirement, working under the direct supervision of the radiation safety officer at a uranium or mineral extraction/recovery, radioactive waste processing, or radioactive waste or by-product material disposal facility; and

(C) have at least four weeks of specialized training in health physics or radiation safety applicable to uranium or mineral extraction/recovery, radioactive waste processing, or radioactive waste or by-product material disposal operations from a course provider that has been evaluated and approved by the agency.

(b) The agency may request, and the licensee must provide, additional information after the license has been issued to enable the agency to determine whether the license should be modified, suspended, or revoked.

§336.1217. Commencement of Major Construction.

Commencement of major construction is prohibited until a license has been issued by the commission.

§336.1219. Commencement of Operations.

No licensee issued a license under this section may commence operations until the licensee has obtained licenses or permits from other agencies as required by law.

§336.1221. Specific Terms and Conditions of Licenses.

(a) Unless otherwise specified, each license issued in accordance with this subchapter is subject to the requirements in §305.125 of this title (relating to Standard Permit Conditions). A license issued under this subchapter must include license conditions derived from the evaluations of the application and analyses performed by the agency, including amendments and changes made before a license is issued. License conditions may include, but are not limited to, the following:

(1) restrictions as to the total radioactive inventory of radioactive substances to be received;

(2) restrictions as to size, shape, and materials and methods of construction of radioactive substances packaging and maximum number of package units stored, at any one time;

(3) restrictions as to the physical and chemical form and radioisotopic content and concentration of radioactive substances;

(4) controls to be applied to restrict access to the site;

(5) controls to be applied to maintain and protect the health and safety of the public and site employees and the environment;

(6) administrative controls, which are the provisions relating to organization, management, and operating procedures; recordkeeping, review and audit; and reporting necessary to assure that activities at the facility are conducted in a safe manner and in conformity with agency rules and license conditions;

(7) maximum retention time for radioactive substances received at the facility; and

(8) term of the specific license for a fixed term not to exceed ten years.

(b) The commission may incorporate in any license at the time of issuance, or thereafter, by appropriate rule or order, additional requirements or conditions with respect to the licensee's receipt, possession, or transfer of radioactive substances as it deems appropriate or necessary in order to:

(1) protect the health and safety of the public and the environment; or

(2) require reports and recordkeeping and to provide for inspections of activities under the licenses that may be necessary or appropriate to effectuate the purposes of the Texas Radiation Control Act and rules thereunder.

(c) Each person licensed by the commission in accordance with this subchapter shall confine the use and possession of the radioactive substance licensed to the locations and purposes authorized in the license.

§336.1223. Renewal of Licenses.

(a) Renewal of licenses must be filed in accordance with §336.205 of this title (relating to Application Requirements) and §336.1211 of this title (relating to Filing Application for a Specific License).

(b) The licensee is responsible for decommissioning the facility and continued safe storage of any radioactive substances whether an application for continued receipt of radioactive substances is filed or not.

§336.1225. Amendment of License at Request of Licensee.

Applications for amendment of a license shall be filed in accordance with §336.1211 of this title (relating to Filing Application for a Specific License) and §336.205 of this title (relating to Application Requirements). Amendment applications must be signed by the RSO, specify the proposed amendment, and describe the basis for such amendment.

§336.1227. Radioactive Substances Processing and Packaging Requirements.

All processed radioactive substances offered for transport or disposal must meet:

(1) all applicable transportation requirements of the agency, the United States Nuclear Regulatory Commission, and of the DOT; and

(2) all applicable disposal facility license conditions.

§336.1229. Environmental Assessment.

A written analysis of the impact on the human environment will be prepared or secured by the agency for any license for a class III processing or storage facility in accordance with §281.21(f) of this title (relating to Draft Permit, Technical Summary, Fact Sheet, and Compliance History).

§336.1231. Radioactive Substances Processing and Storage Categories of Radionuclides.

(a) The following table contains waste processing and storage categories of radionuclides.
Figure: 30 TAC §336.1231(a)

(b) Any radionuclide not specifically listed in subsection (a) of this section must be assigned to one of the categories in accordance with the following table.
Figure: 30 TAC §336.1231(b)

(c) For mixtures of radionuclides, the following must apply.

(1) If the identity and respective activity of each radionuclide are known, the permissible activity of each radionuclide shall be such that the sum, for all categories present, of the ratio between the total activity for each category to the permissible activity for each category will not be greater than unity.

(2) If the categories of the radionuclides are known but the amount in each category cannot be reasonably determined, the mixture must be assigned to the most restrictive category present.

(3) If the identity of all or some of the radionuclides cannot be reasonably determined, each of those unidentified radionuclides shall be considered as belonging to the most restrictive category that cannot be positively excluded.

(4) Mixtures consisting of a single radioactive decay chain where the radionuclides are in the naturally occurring proportions must be considered as consisting of a single radionuclide. The category and activity must be that of the first member present in the chain, except that if radionuclide "X" has a half-life longer than that of that first member and an activity greater than that of any other member, including the first, at any time during processing, the waste processing and storage category must be that of nuclide "X" and the activity of the mixture must be the maximum activity of nuclide "X" during processing.

§336.1233. Radiation Safety Committee.
The duties and responsibilities of the Radiation Safety Committee include but are not limited to the following:

(1) meeting as often as necessary to conduct business but no less than three times a year;

(2) reviewing summaries of the following information presented by the radiation safety officer:

(A) over-exposures;

(B) significant incidents, including spills, contamination, or medical events; and

(C) items of noncompliance following an inspection;

(3) reviewing the program for maintaining doses as low as reasonably achievable, and providing any necessary recommendations to ensure doses are as low as reasonably achievable;

(4) reviewing the overall compliance status for authorized users;

(5) sharing responsibility with the radiation safety officer to conduct periodic audits of the radiation safety program;

(6) reviewing the audit of the radiation safety program and acting upon the findings;

(7) developing criteria to evaluate training and experience of new authorized user applicants;

(8) evaluating and approving authorized user applicants who request authorization to use radioactive material at the facility;

(9) evaluating new uses of radioactive material; and

(10) reviewing and approving permitted program and procedural changes prior to implementation.

§336.1235. Financial Assurance for Storage and Processing.

(a) A licensee must establish financial assurance for decommissioning and any other requirements of this subchapter 60 days prior to the possession of radioactive substances.

(b) In establishing financial assurance, the licensee's cost estimates must take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning.

The amount of financial assurance must be in an amount approved by the agency.

(c) The licensee's financial assurance mechanism and cost estimates will be reviewed annually by the agency to assure that sufficient funds are available for completion of decommissioning. A licensee must submit a cost estimate report annually for decommissioning the facility in accordance with the decommissioning plan by no later than the anniversary date of the issuance of the license. The licensee must provide any increase in the amount of financial assurance within 60 days of a determination of the cost estimate by the executive director.

(d) Self-insurance, or any arrangement that essentially constitutes self-insurance (for example, a contract with a state or federal agency) will not satisfy the financial assurance requirement because this provides no additional financial assurance other than that which already exists through license requirements.

(e) In addition to the requirements of this subchapter, all licensees authorized under this subchapter and all financial assurance mechanisms submitted to comply with this subchapter are subject to the requirements of Chapter 37, Subchapter T of this title (relating to Financial Assurance for Radioactive Substances).

(f) Licensees with financial assurance mechanisms issued to meet the requirements of the Texas Department of State Health Services must submit replacement mechanisms to comply with this subchapter and the requirements of Chapter 37, Subchapter T of this title by June 1, 2008.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703842
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 239-6087

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.12

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §145.12 concerning parole considerations. The amendments are proposed to incorporate new language under Chapter 145, Parole. The purpose of the amendments is to establish a voting option for placement of offenders into the Serious and Violent Offender Reentry Initiative (SVORI) program, and to restore language about subsequent reviews of parole after denial.

Rissie Owens, Chair of the Board, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering this section.

Ms. Owens also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide a method of selection of certain offenders to undergo a TDCJ rehabilitation program prior to release. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rule as proposed.

Comments should be directed to Laura McElroy, General Counsel, Texas Board of Pardons and Paroles, 209 West 14th Street, Suite 500, Austin, Texas 78701. Written comments from the general public must be received within 30 days of the publication of this amendment.

The amendments are proposed under §508.036, Government Code, which provides the board with the authority to promulgate rules relating to the board's decision-making processes, and §508.044, Government Code, providing the board with the authority to adopt rules relating to the eligibility of an inmate for release on parole or mandatory supervision.

No other statutes, articles or codes are affected by these amendments.

§145.12. Action upon Review

A case reviewed by a parole panel for parole consideration may be:

(1) deferred for request and receipt of further information;

(2) denied a favorable parole action at this time and set for review on a future specific month and year (Set-Off). The next review date (Month/Year) for an offender serving a sentence listed in §508.149(a), Government Code, may be set at any date after the first anniversary of the date of denial and end before the fifth anniversary of the date of denial. The next review date for an offender serving a sentence not listed in §508.149(a), Government Code, shall be as soon as practicable after the first anniversary of the denial.

(3) denied parole and ordered serve-all, but in no event shall this be utilized if the offender's projected release date is greater than five years for offenders serving sentences listed in §508.149(a), Government Code or greater than one year for offenders not serving sentences listed in §508.149(a), Government Code. If the serve-all date in effect on the date of the panel decision is extended by more than 180 days, the case shall be placed in regular parole review;

(4) determined that the totality of the circumstances favor the offender's release on parole, further investigation (FI) is ordered in the following manner; and, upon release to parole, all conditions of parole or release to mandatory supervision that the parole panel is required by law to impose as a condition of parole or release to mandatory supervision are imposed;

(A) FI-1--Release the offender when eligible;

(B) FI-2 (Month/Year)--Release on a specified future date;

(C) FI-3 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than three months from specified date. Such TDCJ program shall be either CHANGES/Lifeskills, Voyager, Segovia Pre-Release Center (Segovia PRC), or any other approved tier program [~~may include~~];

(D) FI-4 (Month/Year)--Transfer to a Pre-Parole Transfer facility prior to presumptive parole date set by a board panel and release to parole supervision on presumptive parole date;

(E) FI-4R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than four months from specified date. Such TDCJ program shall be either the Sex Offender Education Program (SOEP) or the Sex Offender Treatment Program (SOTP);

(F) [~~(E)~~] FI-5 Transfer to In-Prison Therapeutic Community Program. Release to aftercare component only after completion of IPTC program;

(G) [~~(F)~~] FI-6 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and no earlier than six months from specified date. Such TDCJ program may include the Pre-Release Therapeutic Community (PRTC), Pre-Release Substance Abuse Program (PRSAP), or In-Prison Therapeutic Community Program (IPTC), or any other approved tier program;

(H) [~~(G)~~] FI-7 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and not earlier than seven months from the specified date. Such TDCJ program shall be the Serious and Violent Offender Reentry Initiative (SVORI);

~~[(H) FI-9 R (Month/Year)--Transfer to a TDCJ rehabilitation program. Release to parole only after program completion and no earlier than nine months from specified date. Such TDCJ program may include the In-Prison Therapeutic Community (IPTC);]~~

(I) FI-18 R (Month/Year)--Transfer to a TDCJ rehabilitation treatment program. Release to parole only after program completion and no earlier than 18 months from specified date. Such TDCJ program shall be either [~~may include~~] the Sex Offender Treatment Program (SOTP), or the InnerChange Freedom Initiative (IFI);

(5) any person released to parole after completing a TDCJ treatment program as a prerequisite for parole, must participate in and complete any required post-release program. A parole panel shall require as a condition of release on parole or release to mandatory supervision that an offender who immediately before release is a participant in the program established under §501.0931 participate as a releasee in a drug or alcohol abuse continuum of care treatment program;[~~.~~]

(6) Any offender receiving an FI vote, as listed in paragraph (4)(A) - (I) of this section, shall be placed in a program consistent with the vote. If treatment program managers recommend a different program for an offender, a transmittal shall be forwarded to the parole panel requesting approval to place the offender in a different program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 27, 2007.

TRD-200703917
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 406-5388

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37 TAC §145.17

The Texas Board of Pardons and Paroles proposes an amendment to 37 TAC §145.17, concerning action upon special review--release denied. The amendment is proposed to clarify the procedures regarding subsequent reviews of parole panel votes to deny release to parole or mandatory supervision.

Rissie Owens, Chair of the Board, has determined, that for the first five-year period the proposed amendment is in effect, no fiscal implications exist for state or local government as a result of enforcing or administering this section.

Ms. Owens also has determined that for each year of the first five years the amended rule as proposed are in effect, the public benefit anticipated as a result of the amendment to this section will be to bring the rules into compliance with current board practice. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rule as proposed.

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 211 W. 14th Street, Suite 500, Austin, Texas 78701. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rule is proposed under §§508.036, 508.0441, and 508.141, Government Code. Section 508.036 provides the board with the authority to adopt rules relating to the decision-making processess used by the board and parole panels. Section 508.0441 provides the board with the authority to adopt reasonable rules as proper or necessary relating to the eligibility of an inmate for release on parole or release to mandatory supervision. Section 508.141 provides the board authority to adopt policy establishing the date on which the board may reconsider for release an inmate who has previously been denied release.

No other statutes, articles, or codes are affected by the amendment.

§145.17. Action upon Special Review--Release Denied.

(a) This rule provides a forum for receipt and consideration of information not previously available to the parole panel where the decision of the panel was to deny release to parole or mandatory supervision. If the denial decision was based upon erroneous information or an administrative file processing error, this rule does not apply. [~~While affording a remedy for consideration of such information, the Board also intends by this rule to reduce frivolous and duplicate requests for special consideration.~~]

(b) Requests for special review shall apply only to cases reviewed for release to parole or mandatory supervision where the decision of the parole panel was to deny release to parole or mandatory supervision.

(c) All requests for special review shall be in writing and signed by the offender, his or her attorney, or in cases where the offender is unable to sign due to a mental or physical impairment, by a person acting on his or her behalf [~~or their attorney~~].

(d) All requests for special review shall be filed with the Texas Board of Pardons and Paroles, Board Administrator, P.O. Box 13401, Austin, Texas 78711.

(e) The board administrator shall refer to the special review parole panel only those requests for special review which meet the criteria set forth herein.

(f) Requests for special review shall be considered in the following circumstances:

(1) a parole panel denied release to parole or mandatory supervision and a parole panel member who voted with the majority on that panel desires to have the decision reconsidered prior to the next review (NR) date; or

(2) a written request on behalf of an offender is received which cites information not previously available to the parole panel.

(3) both parole panel members who voted with the majority are no longer active board members or parole commissioners, and the presiding officer (chair) places the decision in the special review process to be reconsidered prior to the NR date.

(g) Information not previously available shall mean only:

(1) responses from trial officials and victims;

(2) a change in an offender's sentence and judgment; or

(3) an allegation that the parole panel has committed an error of law or board rule.

(h) A special review parole panel, other than the current voting panel, shall decide and exercise final action on such requests for special review.

(i) Upon considering a case for special review, the special review parole panel may take the following action:

(1) defer for request and receipt of further information;

(2) vote remain set; or

(3) revote the case in accordance with applicable provisions of Subchapter A of this chapter (relating to Parole Process).

(j) The special review parole panel shall not set an offender's NR date on a date later than the previous NR date.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 27, 2007.

TRD-200703916
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 406-5388

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CHAPTER 146. REVOCATION OF PAROLE OR MANDATORY SUPERVISION

37 TAC §146.11

The Texas Board of Pardons and Paroles proposes an amendment to 37 TAC §146.11, concerning releasee's motion to reopen hearing or reinstate supervision. The amendment is proposed for the purpose of clarifying the procedures for submission of a releasee's motion to reopen hearing or reinstate supervision.

Rissie Owens, Chair of the Board, has determined, that for the first five-year period the proposed amendment is in effect, no fiscal implications exist for state or local government as a result of enforcing or administering this section.

Ms. Owens also has determined that for each year of the first five years the amended rule as proposed is in effect, the public benefit anticipated as a result of the amendment to this section will be to bring the rules into compliance with current board practice. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rule as proposed.

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 211 W. 14th Street, Suite 500, Austin, Texas 78701. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rule is proposed under §§508.0441, 508.045, 508.281, and 508.283, Government Code. Section 508.0441 vests the Board with the authority to determine the continuation, modification, and revocation of parole or mandatory supervision. Section 508.045 provides parole panels with the authority to grant, deny, or revoke parole, or revoke mandatory supervision. Section 508.281 and §508.283 relate to hearings to determine violations of the releasee's parole or mandatory supervision.

No other statutes, articles, or codes are affected by the amendment.

§146.11. Releasee's Motion To Reopen Hearing or Reinstate Supervision.

(a) The releasee or releasee's attorney shall have 60 days from the date of the board panel's revocation decision to request a reopening of the case for any substantial error in the revocation process or upon newly discovered information.

(b) A request to reopen the revocation hearing or reinstate supervision submitted later than 60 days from the date of the board panel's revocation decision will not be considered unless under exceptional circumstances including but not limited to:

(1) judicial reversal of a judgment of conviction of a criminal offense where the offense constituted an underlying factor in the initial revocation decision;

(2) judicial order requiring a hearing;

(3) initial revocation effected without opportunity for a hearing or waiver as required under law.

(c) Any such request for reopening made under this section must be in writing and delivered to the board or placed in the United States mail and addressed to the Texas Board of Pardons and Paroles, General Counsel, 8610 Shoal Creek Blvd. [~~Board Administrator, P.O. Box 13401~~], Austin, Texas 78757 [~~78711~~].

(d) On transmittal, a board panel designated by the chair other than the original panel shall dispose of the motion by:

(1) granting of the motion and ordering that the hearing be reopened for a stated specified and limited purpose;

(2) denial of the motion; or

(3) reversal of the panel decision previously entered and withdrawal of the board's revocation warrant, under the same terms and provisions as provided in §146.10 of this title (relating to Final Board Disposition).

(e) The releasee and attorney, if any, shall be notified in writing of the board panel's decision.

(f) When a releasee's motion to reopen the hearing under this section is granted, the releasee shall be deemed to have consented to such further reasonable delay in the final disposition of his or her case as shall be required for the procedure described in §146.12 of this title (relating to Procedure after Motion To Reopen Is Granted; Time; Rights of the Releasee; Final Disposition).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 27, 2007.

TRD-200703915
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 406-5388

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 15. TEXAS VETERANS COMMISSION

CHAPTER 452. ADMINISTRATION GENERAL PROVISIONS

40 TAC §452.2

The Texas Veterans Commission (commission) proposes new §452.2, regarding advisory committees. The proposed new section establishes the responsibilities, composition, and terms for agency advisory committees. The proposed new rule is authorized under Government Code §434.0101, granting the commission the authority to establish advisory committees for the development of rules or policies. Government Code §2110.005 requires an agency that establishes an advisory committee to adopt rules for the establishment of those committees.

Tina M. Coronado, General Counsel for the commission, has determined that for each year of the first five year period that the new rule is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section. There will be a reduction in costs to the agency because the advisory committee will advise and make recommendations on rules and policies with reduced or no staff resources expended.

Ms. Coronado has also determined that for the first five years the new rule is in effect the public will benefit from a reduced expenditure of staff resources supporting the duties of the advisory committee. There will be no effect on individuals, or large, small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Coronado has also determined that for each year of the first five-year period the proposed rule is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new rule may be submitted to Tina M. Coronado, General Counsel, Texas Veterans Commission, 1700 N. Congress, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to Tina.Coronado@tvc.state.tx.us. For comments submitted electronically, please include "Advisory Committee Rule" in the subject line. The deadline for submission of comments is twenty (20) days from the date of publication of the proposed rule in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration.

The new section is proposed pursuant to Government Code §434.010, which provides general authority for the commission to adopt rules necessary for its administration; HB 3426; Government Code, §436.0101, which provides for the creation of Advisory Committees; and Government Code, Chapter 2110, regarding the establishment of agency advisory committees.

No other statutes, articles, or codes are affected by this section.

§452.2. Advisory Committees.

(a) The commission may establish advisory committees in accordance with Government Code Chapter 2110.

(b) Composition. The commission shall appoint a reasonable number of advisory committee members to each advisory committee established not to exceed twenty-four members. The commission may appoint one or more commissioners to participate as a non-voting member of an advisory committee. Each advisory committee appointed shall select a presiding officer from among its voting members.

(c) Duration. The commission shall establish the date for abolishing each advisory committee at the time of its creation.

(d) Conditions of advisory committee membership.

(1) The term of office for each member shall be two years. A member whose term has expired shall continue to serve until a qualified replacement is appointed by the commission. In the event a member cannot complete his or her term, the commission shall appoint a qualified replacement to serve the remainder of the term.

(2) Participation in an advisory committee is voluntary. Advisory committee members shall serve without compensation. Travel reimbursement and per diem incurred in the performance of their official duties will be paid only if authorized by the Texas Legislature in the General Appropriations Act.

(e) Responsibilities. An advisory committee will study issues and provide advice to the commission, as charged by the commission.

(f) Meetings. Advisory committee meetings may be conducted by telephone conference. Each advisory committee shall be subject to meeting at the call of the presiding member. A quorum shall consist of a majority of the advisory committee membership.

(g) Reports. The presiding member shall regularly report to the commission regarding its activities and recommendations. The presiding member, when requested by the commission, shall file with the commission, a report containing:

(1) the minutes of meetings;

(2) a memo summarizing the meetings; and

(3) a list of its recommendations, if any.

(h) Evaluation of costs and effectiveness. The commission shall evaluate each advisory committee annually. Evaluation shall be conducted by an evaluation team appointed by the Executive Director. The evaluation team shall report to the commission in open meeting each August of its findings regarding:

(1) Each advisory committee's work;

(2) Each advisory committee's usefulness; and

(3) The costs related to each advisory committee's existence, including the cost of agency staff time spent in support of each advisory committee's activities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703845
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-1981

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40 TAC §452.3

The Texas Veterans Commission (commission) proposes new §452.3, concerning Negotiated Rulemaking. The proposed new section establishes the policy and procedures for negotiated rulemaking. The proposed new rule is authorized under Government Code §434.0077, directing the commission to develop and implement a policy to encourage the use of negotiated rulemaking.

Tina M. Coronado, General Counsel for the commission, has determined that for each year of the first five year period that the new rule is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section. There will be a reduction in costs to the agency because this section will streamline and make more efficient certain rulemaking procedures undertaken by the commission.

Ms. Coronado has also determined that for the first five years the new rule is in effect the public will benefit from the streamlining and increased efficiency of certain rulemaking procedures undertaken by the commission. There will be no effect on individuals, or large, small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Coronado has also determined that for each year of the first five-year period the proposed rule is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new rule may be submitted to Tina M. Coronado, General Counsel, Texas Veterans Commission, 1700 N. Congress, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to Tina.Coronado@tvc.state.tx.us. For comments submitted electronically, please include "Negotiated Rulemaking Rule" in the subject line. The deadline for submission of comments is twenty (20) days from the date of publication of the proposed rule in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration.

The new section is proposed pursuant to Government Code §434.010, which provides general authority for the commission to adopt rules necessary for its administration; and Government Code, §434.0077, which directs the commission to develop and implement a policy to encourage the use of negotiated rulemaking.

No other statutes, articles, or codes are affected by this section.

§452.3. Negotiated Rulemaking.

(a) The commission's policy is to encourage the use of negotiated rulemaking for the adoption of commission rules in appropriate situations.

(b) The commission's general counsel or designee shall be the commission's negotiated rulemaking coordinator (NRC). The NRC shall perform the following functions, as required:

(1) coordinate the implementation of the policy set out in subsection (a) of this section, and in accordance with the Negotiated Rulemaking Act, Chapter 2008, Government Code;

(2) serve as a resource for any staff training or education needed to implement negotiated rulemaking procedures; and

(3) collect data to evaluate the effectiveness of negotiated rulemaking procedures implemented by the commission.

(c) The commission, its rules committee, or the executive director may direct the NRC to begin negotiated rulemaking procedures on a specified subject.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703848
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-1981

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40 TAC §452.4

The Texas Veterans Commission (commission) proposes new §452.4, concerning Alternative Dispute Resolution (ADR). The proposed new section establishes the policy and procedures for ADR. The proposed new rule is authorized under HB 3426 and Government Code §434.0077, directing the commission to develop and implement a policy to encourage the use of ADR.

Tina M. Coronado, General Counsel for the commission, has determined that for each year of the first five year period that the new rule is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section. There will be a reduction in costs to the agency because this section will seek to resolve contested matters at the earliest stage and reduce costly litigation.

Ms. Coronado has also determined that for the first five years the new rule is in effect the public will benefit from resolving contested matters at an early stage in the process and reduce costly litigation. There will be no effect on individuals, or large, small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Coronado has also determined that for each year of the first five-year period the proposed rule is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new rule may be submitted to Tina M. Coronado, General Counsel, Texas Veterans Commission,

1700 N. Congress, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to Tina.Coronado@tvc.state.tx.us. For comments submitted electronically, please include "Alternative Dispute Resolution" in the subject line. The deadline for submission of comments is twenty (20) days from the date of publication of the proposed rules in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration.

The new section is proposed pursuant to Government Code §434.010, which provides general authority for the commission to adopt rules necessary for its administration; HB 3426; and Government Code, §434.0077, which directs the commission to develop and implement a policy to encourage the use of ADR.

No other statutes, articles, or codes are affected by this section.

§452.4. Alternative Dispute Resolution.

(a) The commission's policy is to encourage the resolution and early settlement of internal and external disputes, through voluntary settlement processes, which may include any procedure or combination of procedures described by Chapter 154, Civil Practice and Remedies Code. Any ADR procedure used to resolve disputes before the board shall comply with the requirements of Chapter 2009, Government Code, and any model guidelines for the use of ADR issued by the State Office of Administrative Hearings.

(b) The commission's Director of Human Resources or designee shall be the commission's dispute resolution coordinator (DRC). The DRC shall perform the following functions, as required:

(1) coordinate the implementation of the policy set out in subsection (a) of this section;

(2) serve as a resource for any staff training or education needed to implement the ADR procedures; and

(3) collect data to evaluate the effectiveness of ADR procedures implemented by the board.

(c) The commission, a committee of the commission, a respondent in a disciplinary matter pending before the commission, the executive director, or a commission employee engaged in a dispute with the executive director or another employee, may request that the contested matter be submitted to ADR. The request must be in writing, be addressed to the DRC, and state the issues to be determined. The person requesting ADR and the DRC will determine which method of ADR is most appropriate. If the person requesting ADR is the respondent in a disciplinary proceeding, the executive director shall determine if the board will participate in ADR or proceed with the board's normal disciplinary processes.

(d) Any costs associated with retaining an impartial third party mediator, moderator, facilitator, or arbitrator, shall be borne by the party requesting ADR.

(e) Agreements of the parties to ADR must be in writing and are enforceable in the same manner as any other written contract. Confidentiality of records and communications related to the subject matter of an ADR proceeding shall be governed by §154.073 of the Civil Practice and Remedies Code.

(f) If the ADR process does not result in an agreement, the matter shall be referred to the board for other appropriate disposition.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703849
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-1981

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40 TAC §452.5

The Texas Veterans Commission (commission) proposes new §452.5, concerning Petition for Adoption of Rules. The proposed new section establishes the policy and procedures for an interested person to petition the commission for the adoption of rules. The proposed new rule is authorized under HB 3426 and Government Code §434.010, directing the commission to develop procedures for receiving input and recommendations from interested persons regarding the development of rules and policies.

Tina M. Coronado, General Counsel for the commission, has determined that for each year of the first five year period that the new rule is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section. There will be improvement to the agency because this section will give interested persons an avenue to express ideas for improvement of current commission practice.

Ms. Coronado has also determined that for the first five years the new rule is in effect the public will benefit from the rule that will provide an avenue for interested persons to express ideas for improving commission practices. There will be no effect on individuals, or large, small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Coronado has also determined that for each year of the first five-year period the proposed rule is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new rule may be submitted to Tina M. Coronado, General Counsel, Texas Veterans Commission, 1700 N. Congress, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to Tina.Coronado@tvc.state.tx.us. For comments submitted electronically, please include "Petition for Adoption of Rules" in the subject line. The deadline for submission of comments is twenty (20) days from the date of publication of the proposed rule in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration.

The new section is proposed pursuant to Government Code §434.010, which provides general authority for the commission to adopt rules necessary for its administration; HB 3426; and Government Code, §434.0077, which directs the commission to develop and implement a policy to encourage the use of ADR.

No other statutes, articles, or codes are affected by this section.

§452.5. Petition for Adoption of Rules.

(a) Any interested person or organization may petition the commission requesting the adoption or amendment of a rule.

(b) For the purpose of interpreting this section, the term "rule" shall have the same meaning as contained in Government Code, Chapter 2001, §2001.003.

(c) Petitions for adoption of rules must be submitted in writing and directed to the commission's executive director.

(d) The petitioner may either hand deliver the petition to the commission's central office at 1711 San Jacinto Boulevard, Austin, Texas 78701, or mail the petition to P.O. Box 13047, Austin, Texas 78711-3047.

(e) For purposes of calculating days under this section, the date of submission of a petition under this section shall be the date the petition is hand delivered to the commission, or if the petition was sent by mail or carrier, the date it is date-stamped according to regular agency incoming mail procedures.

(f) The petition must include the following minimum requirements:

(1) specify or otherwise make clear that the petition is made pursuant to the provisions of the Administrative Procedure Act;

(2) clearly state the body or substance of the rule requested for adoption, and, if appropriate, relate the requested rule to an adopted rule or rules of the commission;

(3) contain the full name and address of the petitioner; and

(4) be signed by the petitioner.

(g) The executive director or the executive director's designee, shall:

(1) acknowledge receipt of the petition in writing and include in the letter the date the petition was received; and

(2) communicate with the petitioner, if necessary, to clarify the requested rule or to clarify other relevant information contained in the petition.

(h) Not later than the 60th day after the date of submission of a petition under this section, the executive director shall either:

(1) deny the petition in writing, stating the reasons for the denial; or

(2) initiate rulemaking procedures and inform the petitioner of the date rule action by the commission is scheduled pursuant to Government Code, Title 10, Chapter 2001.

(i) The executive director shall provide copies of all petitions, whether denied or approved, to the commissioners prior to a scheduled commission meetings for review.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703850
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-1981

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40 TAC §452.6

The Texas Veterans Commission (commission) proposes new §452.6, concerning public participation at commission meetings. The proposed new section establishes the policy and procedures for public participation at commission meetings. The proposed new rule is authorized under HB 3426 and Government Code §434.0151, directing the commission to develop and implement a policy for public participation at commission meetings.

Tina M. Coronado, General Counsel for the commission, has determined that for each year of the first five year period that the new rule is in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of enforcing or administering the section.

Ms. Coronado has also determined that for the first five years the new rule is in effect the public will benefit from a policy and procedure for public participation in commission meetings. There will be no effect on individuals, or large, small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Ms. Coronado has also determined that for each year of the first five-year period the proposed rule is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed new rule may be submitted to Tina M. Coronado, General Counsel, Texas Veterans Commission, 1700 N. Congress, Austin, Texas 78701 or by fax to (512) 463-3288. Comments may also be submitted electronically to Tina.Coronado@tvc.state.tx.us. For comments submitted electronically, please include "Public Participation" in the subject line. The deadline for submission of comments is twenty (20) days from the date of publication of the proposed rule in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration.

The new section is proposed pursuant to Government Code §434.010, which provides general authority for the commission to adopt rules necessary for its administration; HB 3426; and Government Code, §434.0151, which directs the commission to develop and implement a policy for public participation at commission meetings.

No other statutes, articles, or codes are affected by this section.

§452.6. Public Participation.

(a) The commission shall include "public comment" as a topic on the agenda for each regularly scheduled commission meeting.

(b) A person wishing to address the commission about any subject under the commission's jurisdiction shall fill out a Public Comment form prior to the start of the meeting and submit the form to the chair.

(c) The chair will recognize those requests to address the commission during the "public comment" portion of a meeting.

(d) A person may address the commission regarding any issue related to the jurisdiction of the commission. The chair or executive director may impose a time limit for those wishing to address or make a presentation to the commission. The allotted period for a person addressing the commission may only be extended by commission vote and may not be extended by another person delegating, ceding, passing or otherwise granting allotted comment time in lieu of addressing the commission.

(e) The commission may not comment or make a decision about a subject not listed on the agenda except to reply with:

(1) a statement of specific factual information in response to the inquiry;

(2) a recitation of existing policy in response to the inquiry; or

(3) a proposal to place the subject on the agenda for a subsequent commission meeting.

(f) At least 20 days prior to a meeting, a person from the general public may submit a written request to the chair or executive director for an item to be placed on the meeting agenda. The executive director shall forward such requests to the chair. The chair shall consider the request but has the discretion to include the requested item on the agenda or to only allow for comment as described in subsections (a) - (e) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703851
Tina Coronado
General Counsel
Texas Veterans Commission
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-1981

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

SUBCHAPTER F. ADVISORY COMMITTEES

43 TAC §1.82, §1.85

The Texas Department of Transportation (department) proposes amendments to §1.82, statutory advisory committee operations and procedures, and §1.85, department advisory committees.

EXPLANATION OF PROPOSED AMENDMENTS

The department proposes amendments to its rules governing advisory committees to extend committee sunset dates.

Section 1.82 prescribes rules governing the operations and procedures of department advisory committees that are created specifically by state law.

Section 1.82(i) currently provides that each statutory advisory committee is abolished December 31, 2007. This sunset date was established to comply with Government Code, §2110.008, which requires a state agency to establish by rule a date on which advisory committees will automatically be abolished unless continued. The commission determines that its statutory advisory committees are necessary to improve communication between the department and the public. Therefore, §1.82(i) is amended to revise the sunset date to December 31, 2009.

Section 1.85 provides for the creation and operating procedures of advisory committees that are not created by statute.

Section 1.85(c), Duration, currently provides that each advisory committee created under §1.85 is abolished December 31, 2007. This sunset date was established to comply with Government Code, §2110.008. The commission determines that each committee created under §1.85 is necessary to improve communication between the department and the public. Therefore, §1.85(c) is amended to revise the sunset date to December 31, 2009.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that, for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Bob Jackson, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed amendments.

PUBLIC BENEFIT

Mr. Jackson has also determined that, for each year of the first five years the amended sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be enhanced communication between the department and the public. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §1.82, and §1.85, may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 8, 2007.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, Chapter 2110, which governs the operations of state agency advisory committees.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2110, and Transportation Code, §201.101.

§1.82. Statutory Advisory Committee Operations and Procedures.

(a) - (h) (No change.)

(i) Duration. Except as otherwise specified in this subchapter, each statutory advisory committee is abolished December 31, 2009 [~~2007~~], unless the commission amends its rules to provide for a different date.

§1.85. Department Advisory Committees.

(a) - (b) (No change.)

(c) Duration. Except as otherwise specified in this section, a committee created under this section is abolished December 31, 2009 [~~2007~~], unless the commission amends its rules to provide for a different date.

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703880
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

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CHAPTER 9. CONTRACT MANAGEMENT
SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

43 TAC §9.20

The Texas Department of Transportation (department) proposes amendments to §9.20, concerning partial payments.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, Chapter 223, Subchapter A, prescribes the method by which the department receives competitive bids for the improvement of highways that are a part of the state highway system. Pursuant to this authority, the Texas Transportation Commission (commission) has previously adopted §§9.10 - 9.21 to specify the process by which the department will administer and manage highway improvement contracts.

To comply with new federal regulations prohibiting retainage on federal-aid highway improvement contracts as well as statutory amendments as specified in House Bill 2075, 80th Legislature, Regular Session, 2007, paragraph (1) of §9.20, Partial Payments, is amended to remove the requirement that construction contracts and preventative maintenance contracts provide for partial payments. Partial payments may, however, apply to these contracts at the department's discretion. For contracts in existence prior to the adoption of this proposed amendment, the department will consider issuing change orders to release some or all of the retainage that has already been withheld.

Paragraphs (2), (3), and (5) of §9.20 are removed in their entirety as they apply to required partial payments and are no longer needed. Existing paragraph (4) of §9.20 is renumbered to paragraph (2) as a result of these deletions and amended to conform to the changes made to paragraph (1) of that section.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that, for each of the first five years the amendments as proposed are in effect, there will be fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments. Although the majority of retainage is held in local banks, retainage for smaller contracts is held in the State Highway Fund, with the department earning interest on the amounts derived to be constitutionally dedicated. Interest on funds held back due to retainage is approximately $2 million annually, which the department may lose as revenue each year if retainage is no longer held. There are no anticipated economic costs for persons required to comply with the section as proposed.

Thomas Bohuslav, Director, Construction Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed amendments.

PUBLIC BENEFIT

Mr. Bohuslav has also determined that, for each year of the first five years the amended section as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the proposed amendments will be to further the department's mission to provide an efficient and fair process of administering payment for the department's highway improvement contracts in compliance with statutory amendments to Transportation Code, Chapter 223, by House Bill 2075, 80th Legislature, Regular Session, 2007. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §9.20, may be submitted to Thomas Bohuslav, Director, Construction Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 8, 2007.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §§223.001 - 223.016, which requires the department to competitively bid highway improvement contracts.

CROSS REFERENCE TO STATUTE

Transportation Code, §§223.009 - 223.010.

§9.20. Partial Payments.

Highway improvement contracts may provide for partial payments.

(1) Construction and preventive maintenance contracts. Construction contracts and preventive maintenance contracts may [~~will~~] provide for partial payments [~~of an amount not exceeding 95% of the value of the work done, except as provided in paragraph (2) of this section. The department will retain 5.0% of the contract price until the entire work has been completed and accepted, except as provided in paragraphs (2) and (3) of this section~~].

[~~(2) Construction and preventive maintenance contracts involving the use of nonhazardous recycled materials. Construction contracts and preventive maintenance contracts involving the use of nonhazardous recycled materials approved by the department will provide for partial payments of an amount not exceeding 96% of the value of the work done. Prior to beginning of work, the contractor must identify the quantities of nonhazardous recycled materials to be used in the contracted work. Once the contractor's commitment to utilize nonhazardous recycled materials has been established, the department will retain 4.0% of the contract price until the entire work has been completed and accepted, except as provided in paragraph (3) of this section.~~]

[~~(3) Construction and preventive maintenance contracts involving separate vegetative establishment, maintenance, or performance periods. The department may release a portion of the amount retained under paragraph (1) or (2) of this section when the work is completed, provided a sufficient amount of the contract price is retained to ensure satisfactory completion of the separate vegetative establishment, maintenance, or performance period.~~]

(2) [~~(4)~~] At the request of a contractor and with the approval of the department and the comptroller of public accounts, any amount retained [~~the retained amount~~] may be deposited under the terms of a trust agreement with a state or national bank that has its main office or a branch office in Texas as selected by the contractor, provided that the contract price exceeds $300,000. The trust agreement shall provide that:

(A) interest earned on deposited funds will be paid to the contractor unless otherwise specified under the terms of the agreement;

(B) all expenses incident to the deposit and all charges made by the escrow agent for custody of the securities and forwarding of interest shall be paid solely by the contractor;

(C) the department may, at any time and with or without reason, demand in writing that the bank return or repay, within 30 days of the demand, the retainage or any investments in which it is invested; and

(D) any other terms and conditions prescribed by the department and the comptroller of public accounts as necessary to protect the interests of the state.

~~[(5) Routine maintenance and professional services contracts. The department will not retain funds for routine maintenance contracts or contracts for the making of all necessary plans and surveys preliminary to construction, reconstruction, or maintenance.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703881
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

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CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING

SUBCHAPTER I. BORDER COLONIA ACCESS PROGRAM

43 TAC §§15.101, 15.103, 15.105

The Texas Department of Transportation (department) proposes amendments to §§15.101, definitions; 15.103, application procedures; and 15.105, apportionment, concerning the Border Colonia Access Program.

EXPLANATION OF PROPOSED AMENDMENTS

Senate Bill 99, enacted by the 80th Legislature, Regular Session, 2007, amended Government Code, §1403.002 and Transportation Code, §201.116. The amendment to Government Code, §1403.002 directs the Texas Transportation Commission (commission) to adopt a new definition for the term "border colonia." The amendment to Transportation Code, §201.116 requires an applicant for funds administered by the commission to submit a colonia classification number, if one exists, as part of the application process. In addition, the department has independently determined that the maximum allowable cost for a project should be increased to $500,000 per mile.

The definition of "border colonia" contained in §15.101, Definitions, has been amended as required by Senate Bill 99. Future program calls will use the minimum dwelling number set forth in the definition as a requirement for program eligibility.

Section 15.103(b) has been amended by adding new paragraph (5), which requires applicants to submit a colonia classification number, if one exists, on applications for funding. This will enable the department to readily identify eligible colonias for program funding.

Section 15.105(8) has been amended to increase the maximum amount of funding available for each project from $200,000 to $500,000 per mile. The increase in funding is needed to account for transportation project inflation costs that have occurred since the $200,000 limit was adopted.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that, for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Wayne Dennis, Deputy Director, Transportation Planning and Programming Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed amendments.

PUBLIC BENEFIT

Mr. Dennis has also determined that, for each year of the first five years the amended sections as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be improved roadways to eligible border colonias. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§15.101, 15.103, and 15.105, may be submitted to James Randall, Director, Transportation Planning and Programming Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 8, 2007.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, Chapter 1403, which grants the commission the authority to establish guidelines for the administration of the Border Colonia Access Program.

CROSS REFERENCE TO STATUTE

Government Code, §1403.002, and Transportation Code, §201.116.

§15.101. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) AASHTO--The American Association of State Highway and Transportation Officials.

(2) Border colonia--A geographic area that consists of 11 or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood and [~~community,~~] located in an eligible county, that is identified as a colonia in the Texas Water Development Board's colonia database.

(3) Border districts--The El Paso, Laredo, Pharr, and Odessa department districts.

(4) Commission--The Texas Transportation Commission.

(5) County road--A road owned and maintained by a county.

(6) Department--The Texas Department of Transportation.

(7) Eligible costs--The cost of constructing, administering, or providing drainage for a project, including the cost of leasing equipment used substantially in connection with a project, or acquiring materials used solely in connection with a project.

(8) Eligible county--A county located in the El Paso, Laredo, or Pharr department districts, and Terrell County, that has adopted the model rules promulgated by the Texas Water Development Board under Water Code, §16.343.

(9) Executive director--The executive director of the department.

(10) Minimum colonia access road standards--Road standards for the applicable transportation facility, as described in:

(A) the latest editions of appropriate AASHTO design guidelines; or

(B) road standards adopted by a county under Local Government Code, §232.025 and approved by the executive director or designee as sufficient to protect the safety of the traveling public.

(11) Public road--A road owned and maintained by a municipality, county, or the department.

(12) Rural border county--An eligible county that:

(A) has a population of less than 55,000, as determined by the latest decennial census; and

(B) is adjacent to an international border.

§15.103. Application Procedures.

(a) The department, through the border district offices, will issue a program call to the eligible counties to prepare an application for each project that a county would like to submit for consideration. A separate application must be prepared for each project. The border district offices will have application forms available for the counties.

(b) The department will establish a deadline for applications to be received. In order to be considered for the program call, the application must provide:

(1) a clear and concise description of the work proposed;

(2) an implementation plan, including a schedule of proposed activities and a detailed estimate of project costs;

(3) a map delineating project location and termini; [~~and~~]

(4) documentation addressing the criteria prescribed in §15.104 of this subchapter; and[~~.~~]

(5) a colonia classification number, if one exists, for each colonia that may be served by the project.

(c) The department will evaluate the applications, and if determined to be in compliance with this section, will submit the applications to the commission for approval under §15.105 of this subchapter.

§15.105. Apportionment.

The department will apportion and distribute available funds in the manner described by this section.

(1) Each county will receive a minimum of $100,000 in funding during each program call.

(2) In addition to funds distributed under paragraph (1) of this section, an amount equal to 10% of the funding available during each program call shall be set aside and distributed to rural border counties to fund projects in which a colonia access road serving a border colonia located in that county is paved for the first time.

(3) The first 50% of the remaining available funds after the distributions under paragraphs (1) and (2) of this section will be distributed to a county in proportion to its border colonia population, based on the latest estimates from the Texas Water Development Board. The commission will fund the highest ranked projects as evaluated and scored under §15.104 of this subchapter.

(4) The remaining 50% of the remaining available funds will then be distributed to individual counties on a project by project basis. All projects submitted by the counties and not funded under paragraphs (1), (2), and (3) of this section will be funded in descending rank order as determined under §15.104 of this subchapter as available funding permits.

(5) If a county did not submit sufficient eligible projects to expend funds available under paragraphs (1), (2), and (3) of this section, the remaining funds will be distributed in accordance with paragraph (4) of this section. If the remaining funds are not distributed under paragraph (4) of this section because of insufficient eligible projects, the county may use those funds for project cost overruns.

(6) Funds available as a result of a county being prohibited from continued participation in the program under §15.106(e) of this subchapter or because of county reimbursements under §15.106(f) of this subchapter will be distributed in accordance with paragraph (4) of this section.

(7) Projects will be funded based on the project cost estimates provided by a county under §15.103 of this subchapter. Except as provided in paragraph (5) of this section, project costs above that estimate are the responsibility of the county. A county may seek additional funds for a project if the department issues subsequent program calls.

(8) The maximum amount of funding that is available for each project is $500,000 [~~$200,000~~] per mile, unless the executive director or designee not below the level of assistant executive director grants a waiver due to exceptional drainage costs.

(9) Projects partially funded under prior program calls are eligible for funding under this subchapter.

(10) A county may use unexpended funds from a project on any other commission-selected county colonia project.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703882
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

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CHAPTER 21. RIGHT OF WAY

The Texas Department of Transportation (department) proposes amendments to §21.142, concerning definitions; §21.150, concerning permits; §21.154, concerning lighting of signs; new §21.163, concerning electronic signs; amendments to §21.441, concerning permit for erection of off-premise sign; and §21.551, concerning prohibited signs.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

The proposed amendments to §21.150 and §21.441 implement House Bill 2944 (HB 2944), 80th Legislative Session, 2007. The proposed changes to §§21.142, 21.154, and 21.551 and the addition of new §21.163 address issues presented by current technology in the outdoor advertising industry to allow limited use of electronic signs along regulated highways of the state.

Proposed amendments to §21.142, Definitions, define an electronic sign to be a sign, display, or device that changes its message by programmable electronic or mechanical processes.

House Bill 2944 amends Transportation Code, §391.068, to provide that the commission may not issue a permit for a sign within the jurisdiction of a municipality with a population of more than 1.9 million that exercises its authority to regulate outdoor advertising unless the municipality has issued a permit for the sign. To comply with HB 2944, proposed amendments to §21.150, Permits, require that an application for a permit for a sign along a regulated highway that is to be located within the jurisdiction of a municipality with a population of more than 1.9 million be accompanied by a certified copy of the permit issued by the municipality.

Proposed amendments to §21.154, Lighting and Movement of Signs, delete the reference to LED (light emitting diode) screen and other video displays to authorize the use of LED displays as electronic signs.

Proposed new §21.163 regulates the use of electronic signs. The rules place limits on electronic signs to maintain safety on highways.

Proposed new §21.163(a), Electronic images, sets forth the department's determination that the use of an electronic image is not the use of flashing, intermittent, or moving light and, therefore, does not violate §21.154 or any other rule, regulation, or standard promulgated by the department or any agreement between the department and the Secretary of Transportation of the United States that prohibits the use of such technology.

To comply with federal requirements and with respect to the prohibition on mobile signs in order to prevent temporary electronic signs, proposed new §21.163(b), Prohibitions, prohibits the use of flashing, intermittent, or moving lights to illuminate signs; prohibits signs from displaying animated, moving video, or scrolling advertising; prohibits signs that consist of a static image projected upon a stationary object; and prohibits an electronic sign from being located on a truck or trailer.

Proposed new §21.163(c), Location of electronic signs, describes location requirements for electronic signs to provide control of electronic signs at the local government level.

Proposed new §21.163(d), Upgrading an electronic sign, prohibits the addition of lighting to a nonconforming sign and requires a permit to change a conforming sign to an electronic sign.

To insure the safety of the traveling public and to insure compliance with federal requirements, proposed new §21.163(e), Eligible electronic signs, details criteria for electronic signs, including visibility and display requirements.

Proposed new §21.163(f), Safety, describes requirements necessary for automatic adjustments to the sign concerning possible malfunction and concerning brightness levels to insure the safety of the traveling public.

Proposed new §21.163(g), Owner responsibility, lists owner responsibilities including the requirement that owners coordinate with emergency officials and provide contact information to the department in case of electronic sign malfunction.

Proposed new §21.163(h), Granting permits, provides for permit requirements.

Proposed new §21.163(i), Conflicts with subchapter, provides that §21.163 controls in the case of a conflict with other provisions of the subchapter.

House Bill 2944 amends Transportation Code, §394.021 and §394.022, to provide that the commission may not issue a permit for a sign within the jurisdiction of a municipality with a population of more than 1.9 million exercising its authority to regulate off-premises signs unless the municipality has issued a permit for the sign. To comply with HB 2944, §21.441, Permit for Erection of Off-Premise Sign, requires that an application for a permit for an off-premise sign that is visible from the main-traveled way of a rural road and that is located within the jurisdiction of a municipality with a population of more than 1.9 million, must be accompanied by a certified copy of the permit issued by the municipality.

To insure the safety of the traveling public, §21.551 adds requirements prohibiting animated or scrolling displays and digital signs.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that, for each of the first five years the amendments and new section as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments and new section. There are no anticipated economic costs for persons required to comply with the sections as proposed.

John Campbell, Director, Right of Way Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed amendments and proposed new section.

PUBLIC BENEFIT

Mr. Campbell has also determined that, for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the proposed amendments and proposed new section will be to provide information to the traveling public. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on Wednesday, November 28, 2007, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30

a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print, or Braille, are requested to contact Randall Dillard, Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§21.142, 21.150, and 21.154; new §21.163; and proposed amendments to §21.441, and §21.551 may be submitted to John Campbell, Director, Right of Way Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on December 6, 2007.

SUBCHAPTER I. REGULATION OF SIGNS ALONG INTERSTATE AND PRIMARY HIGHWAYS

43 TAC §§21.142, 21.150, 21.154, 21.163

STATUTORY AUTHORITY

The amendments and new section are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, §391.032, which grants the commission the authority to regulate the orderly and effective display of outdoor advertising along a regulated highway within the state and Transportation Code, §394.004, which grants the commission the authority to promote and control the reasonable, orderly, and effective display of outdoor advertising on all highways and roads.

CROSS REFERENCE TO STATUTE

Transportation Code, §§391.021, 391.022, 391.032 and 394.004.

§21.142. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--Transportation Code, Chapter 391, concerning beautification of a regulated highway.

(2) Commercial or industrial activities--Those activities customarily permitted only in zoned commercial or industrial areas except that none of the following shall be considered commercial or industrial:

(A) outdoor advertising structures;

(B) agricultural, forestry, ranching, grazing, farming, and related activities, including, but not limited to, temporary wayside fresh produce stands;

(C) activities not:

(i) housed in a permanent building or structure;

(ii) having an indoor restroom, telephone, running water, functioning electrical connections, and adequate heating; or

(iii) having permanent flooring other than material such as dirt, gravel, or sand;

(D) activities not housed in a permanent building that is visible from the traffic lanes of the main-traveled way;

(E) activities conducted in a building primarily used as a residence;

(F) railroad right of way;

(G) activities that do not have a portion of the regularly used buildings, parking lots, storage or processing areas within 200 feet from the edge of the right of way;

(H) activities conducted only seasonally;

(I) activities conducted in a building having less than 300 square feet of floor space devoted to the activities;

(J) activities that do not have at least one person who is at the activity site, performing work, an average of at least 30 hours per week or at least five days per week;

(K) activities which have not been open for at least 90 days;

(L) recreational facilities such as campgrounds, golf courses, tennis courts, wild animal parks, and zoos, except for the portion of the activities occupied by permanent buildings which otherwise meet the criteria in this subsection and parking lots;

(M) apartment houses or residential condominiums;

(N) areas used by public or private preschools, secondary schools, colleges and universities for education or recreation (this does not preclude trade schools or corporate training campuses);

(O) quarries or borrow pits, except for any portion of the activities occupied by permanent buildings which otherwise meet the criteria in this subsection and parking lots; and

(P) cemeteries, or churches, synagogues, mosques, or other places primarily used for worship.

(3) Commission--The Texas Transportation Commission.

(4) Conforming sign--A sign which is lawfully in place and complies with size, lighting, and spacing requirements and any other lawful regulations pertaining thereto.

(5) Department--The Texas Department of Transportation.

(6) Director--The director of the Right of Way Division of the department.

(7) District engineer--The chief administrative officer in charge of a district of the department.

(8) Electronic sign--A sign, display, or device that changes its message or copy by programmable electronic or mechanical processes.

(9) [~~(8)~~] Erect--To construct, build, raise, assemble, place, affix, attach, embed, create, paint, draw, or in any other way bring into being or establish.

(10) [~~(9)~~] Freeway--A divided highway with frontage roads or full control of access. A proposed freeway is designated a freeway for the purposes of this subchapter when the construction contract is awarded, regardless of whether the main-traveled way is open to the public.

(11) [~~(10)~~] Interchange--A system of interconnecting roadways in conjunction with one or more grade separations that provides for the movement of traffic between two or more roadways or highways on different levels. A proposed interchange is designated an interchange for the purposes of this subchapter when the construction contract is awarded, regardless of whether it is open to the public.

(12) [~~(11)~~] Intersection--The common area at the junction of two roadways as defined in Transportation Code, §541.303.

(13) [~~(12)~~] Interstate highway system--That portion of the national system of interstate and defense highways located within the State of Texas which now or hereafter may be so designated officially by the commission and approved pursuant to 23 United States Code §103.

(14) [~~(13)~~] License--An outdoor advertising license issued by the department pursuant to the provisions of Subchapter C of the Act.

(15) [~~(14)~~] Main-traveled way--The traveled way of a highway that carries through traffic. In the case of a divided highway, the traveled way of each of the separate roadways for traffic in opposite directions is a main-traveled way. It does not include such facilities as frontage roads, turning roadways, or parking areas.

(16) [~~(15)~~] National Highway System--That portion of connected main highways located within the State of Texas which now or hereafter may be so designated officially by the commission and approved pursuant to 23 United States Code §103.

(17) [~~(16)~~] Nonconforming sign--A lawfully erected sign that does not comply with the provisions of a law or rule promulgated at a later date, or which later fails to comply with a law or rule due to changed conditions.

(18) [~~(17)~~] Nonprofit sign--A sign erected and maintained by a nonprofit organization in a municipality or the extraterritorial jurisdiction of a municipality if the sign advertises or promotes only the municipality or another political subdivision whose jurisdiction is in whole or in part concurrent with the municipality.

(19) [~~(18)~~] Outdoor advertising or sign--An outdoor sign, display, light, device, figure, painting, drawing, message, plaque, placard, poster, billboard, logo or symbol, or other thing which is designed, intended, or used to advertise or inform, if any part of the advertising or information contents is visible from any place on the main-traveled way of a regulated highway.

(20) [~~(19)~~] Permit--The authorization granted for either the erection and/or maintenance, of an outdoor advertising sign as provided in the Act, §391.068.

(21) [~~(20)~~] Person--An individual, association, partnership, limited partnership, trust, corporation, or other legal entity.

(22) [~~(21)~~] Primary system or federal-aid primary system--That portion of connected main highways which were designated by the commission as the federal-aid primary system in existence on June 1, 1991 and any highway which is not on that system but which is on the National Highway System.

(23) [~~(22)~~] Public park--A public park, forest, playground, nature preserve, or scenic area designated and maintained by a political subdivision or governmental agency.

(24) [~~(23)~~] Regulated highway--A highway on the interstate highway system or primary system.

(25) [~~(24)~~] Removed--The dismantling and removal of a substantial portion of the parts and materials of a sign or sign structure from the view of the motoring public. The term shall not include the temporary removal of a sign face for operational reasons.

(26) [~~(25)~~] Rest area--An area of public land designated by the department as a rest area, comfort station, picnic area, or roadside park.

(27) [~~(26)~~] Sign face--The part of the sign that contains the message or informative contents and is distinguished from other parts of the sign and other sign faces by separation borders or decorative trim. It does not include lighting fixtures, aprons, and catwalks unless they display part of the message or informative contents of the sign.

(28) [~~(27)~~] Sign structure--All of the interrelated parts and materials, such as beams, poles, braces, apron, catwalk, and stringers, that are used, designed to be used, or are intended to be used to support or display a sign face.

(29) [~~(28)~~] Traveled way--That portion of the roadway used for the movement of vehicles, exclusive of shoulders.

(30) [~~(29)~~] Turning Roadway--A connecting roadway for traffic turning between two intersection legs of an interchange.

(31) [~~(30)~~] Unzoned commercial or industrial area--

(A) An area along the highway right of way which has not been zoned under authority of law, which is not predominantly used for residential purposes, and which is within 800 feet, measured along the edge of the highway right of way, of, and on the same side of the highway as, the principal part of at least two adjacent recognized commercial or industrial activities. To be considered an unzoned commercial or industrial area, the following requirements must be met.

(i) A portion of the regularly used buildings, parking lots, storage or processing areas where each respective business activity is conducted must be within 200 feet of the highway right of way and the permanent building where the activity is conducted must be visible from the main-traveled way.

(ii) To be considered adjacent, there must be no separation of the regularly used buildings, parking lots, storage or processing areas of the two activities by vacant lots, undeveloped areas over 50 feet wide, roads, or streets.

(iii) Two activities may occupy one building as long as each has 300 square feet of floor space dedicated to that activity and otherwise meets the definition of a commercial or industrial activity. There must be separation of the two activities by a dividing wall, separate ownership, or other distinctive characteristics. A separate product line offered by one business will not be considered two activities.

(B) An unzoned commercial or industrial area is more specifically identified as follows.

(i) The area to be considered, based upon the qualifying activities, is 1,600 feet (800 feet on each side) plus the actual or

projected frontage of the commercial or industrial activities, measured along the highway right of way by a depth of 660 feet in accordance with §21.144(b) of this title (relating to Measurements).

(ii) The area shall be located on the same side of the highway as the principal part of the qualifying activities.

(iii) The area must be considered as a whole prior to the application of the test for predominantly residential.

(iv) An area shall be considered to be predominantly residential if more than 50% of the area is being used for residential purposes. Roads and streets with residential property on both sides shall be considered as being used for residential purposes. Other roads and streets will be considered nonresidential.

(32) [~~(31)~~] Visible--Capable of being seen, whether legible or not, without visual aid by a person with normal visual acuity.

(33) [~~(32)~~] Zoned commercial or industrial area--An area designated, through a comprehensive zoning action, for general commercial or industrial use by a political subdivision with legal authority to zone. The following areas are not zoned areas:

(A) areas that permit limited commercial or industrial activities incident to other primary land uses;

(B) areas designated for and created primarily to permit outdoor advertising structures along a regulated highway;

(C) unrestricted areas; and

(D) small parcels or narrow strips of land that cannot be put to ordinary commercial or industrial use and are designated for a use classification different from and less restrictive than that of the surrounding area.

§21.150. Permits.

(a) Eligibility. Except as provided in subsection (l) of this section, a permit under this section may only be issued to a person holding a valid license issued pursuant to §21.149 of this title (relating to Licenses).

(b) Application and issuance.

(1) Except as provided in §21.151 of this title (relating to Local Control) a person who desires a permit to erect or maintain a sign along a regulated highway must file an application in a form prescribed by the department, which shall include, but not be limited to:

(A) the complete name and address of the applicant;

(B) the proposed location and description of the sign;

(C) the complete legal name and address of the designated site owner;

(D) verification of the applicant's nonprofit status if the sign is a nonprofit sign; and

(E) additional information the department deems necessary.

(2) No permit may be approved unless the applicant has obtained written permission from the owner of the designated site. The department may provide a space on the permit application for this signature or the applicant may provide a copy of the written lease for the site or a consent statement in a form prescribed by the department. The signature must be the signature of the property owner or the owner's duly authorized representative. The owner's permission operates as permission for the life of the permit, unless the owner provides a written statement that permission for the maintenance of the sign has been withdrawn and documentation showing that the lease allowing the sign has been terminated in accordance with the terms of the lease agreement or through a court order. If the sign owner disputes the lease termination in court with the owner, the department will not cancel the permit until a court order is provided.

(3) The application must be signed under oath by the sign owner and filed with the district engineer in whose district the sign is to be erected or maintained, and shall be accompanied by the prescribed fee or fees and, if the sign is located within the jurisdiction of a municipality with a population of more than 1.9 million that is exercising its authority to regulate outdoor advertising, a certified copy of the permit issued by the municipality.

(4) An application will not be approved unless the sign for which the permit is requested is located in an unzoned commercial or industrial area or in a zoned commercial or industrial area, and meets all applicable requirements of the sections under this subchapter, or was lawfully in existence when the sign became subject to the Act.

(5) If approved, a copy of the application, endorsed by the district engineer, or designee, and a Texas sign permit plate will be issued to the applicant. Not later than 30 days after erection of the permitted sign, or after the issuance of a permit if the sign is lawfully in existence when the highway along which it is located becomes subject to control by the department, the sign owner shall cause the permit plate to be securely attached to that portion of the sign structure nearest the highway and visible from the main-traveled way. If the permit plate becomes illegible, the department may require that a replacement plate be obtained in accordance with subsection (f) of this section. The plate must be attached and may not be removed from the sign described in the application.

(6) The proposed location for a new sign must be identified by the applicant on the ground by a stake or paint with at least two feet of the stake visible above the ground. The stake must be set at the proposed location of the center pole. Staking the site is considered part of the application. Stakes must not be moved or removed until the application is denied, or if approved, until the sign has been erected. The sketch submitted with the application must reflect the location of the center-pole and show the exact location of the sign faces in relation to the center pole.

(c) Priority. Permits will be considered on a first-come, first-serve basis. If an application is returned because of errors or incomplete information, other applications received for the same or conflicting sites between the time a denied application is returned to the applicant and the time it is resubmitted, will be considered before the resubmitted application. A second application for a conflicting site may be held until a decision is made on the first application.

(d) Renewals.

(1) Subject to the terms and location stated in the permit application, a permit issued or renewed under this section shall be valid for a period of one year, provided that the sign is erected and maintained in accordance with the applicable sections under this subchapter. The permitted sign must be erected within one year from the date the original permit is issued in order for a sign permit to be eligible for renewal.

(2) A permit issued by the department prior to September 6, 1985, must be renewed no later than October 1, of each succeeding year.

(3) An annual permit issued subsequent to September 5, 1985, must be renewed on or before the anniversary date of the date of issuance.

(4) If a sign continues to meet all applicable requirements, a permit holder may renew a permit by filing a written request in a

form prescribed by the department and the prescribed renewal fee at the district office serving the county where the sign is located.

(e) Transfer.

(1) A permit may only be transferred with the written approval of the district engineer. At the time of the transfer, both the transferor and the transferee must hold a valid outdoor advertising license issued pursuant to §21.149 of this title (relating to Licenses), except as provided in subparagraphs (3)-(5) of this subsection.

(2) A permit holder who desires to transfer one or more permits must file a written request in a form prescribed by the department and the prescribed transfer fee at the district office serving the county where the sign is located. The transferor and transferee will each be issued a copy of the approved permit transfer form.

(3) A permit issued under subsection (l) of this section may be transferred to a nonprofit organization that does not hold a valid outdoor advertising license issued under §21.149 of this title (relating to Licenses) if the permit is transferred for the purpose of maintaining a nonprofit sign.

(4) A permit issued under subsection (l) of this section may be transferred for a purpose other than maintaining a nonprofit sign if the transferee holds a valid outdoor advertising license at the time of the transfer.

(5) The director will approve the transfer of one or more sign permits from a lapsed outdoor advertising license to a valid outdoor advertising license, with or without the signature of the transferor, if:

(A) legal documents showing the sale of the sign are provided; and

(B) documents are provided that indicate the transferor is dead or cannot be located.

(6) A permit that has an unresolved permit violation, will not be transferred. An unresolved permit violation means that a permit cancellation is impending or a cancellation has been abated pursuant to subsection (k) of this section pending the outcome of a hearing.

(f) Replacement. In the event a permit plate is lost or stolen, is missing from the sign structure, or becomes illegible, the sign owner must submit to the district engineer a request for a replacement plate in a form prescribed by the department, together with the prescribed replacement plate fee.

(g) Fees.

(1) Except as provided in paragraphs (2) and (3) of this subsection, for a permit issued pursuant to this section:

(A) the original fee is $96;

(B) the annual renewal fee is $40;

(C) the transfer fee is $25 per permit up to a maximum of $2,500 for a single transaction; and

(D) the replacement plate fee is $25.

(2) For a nonprofit sign permit:

(A) the original fee is $10 for each sign;

(B) the annual renewal fee is $10 for each sign; and

(C) the transfer fee is waived for the transfer of a permit issued under subsection (l) of this section if the permit is transferred under subsection (e)(3) of this section. Any other permit transfer is subject to the provisions of paragraph (1) of this subsection.

(3) The initial permit fee is $50 for a sign lawfully in existence which becomes subject to the Act.

(4) A fee prescribed in this subsection is payable by check, cashier's check, or money order, and is nonrefundable.

(5) If a check or money order submitted for fees described in this section is dishonored upon presentment by the department, the permit, renewal, or transfer will be void from inception.

(h) Expiration. A permit automatically expires if:

(1) it is not renewed by the permit holder;

(2) the license under which it was issued expires or is revoked by the department pursuant to §21.149 of this title (relating to Licenses); or

(3) the sign is acquired by the state.

(i) Cancellation. The director may cancel a permit if the sign structure:

(1) is removed;

(2) is not maintained in accordance with applicable sections under this subchapter or the Act;

(3) is damaged beyond the repair threshold contained in §21.156 of title (relating to Discontinuance of Signs);

(4) is abandoned, as determined by §21.156;

(5) is not built in the location described on the permit application or in accordance with the description of the structure on the permit application;

(6) is built by an applicant who uses false or materially misleading information on the permit application;

(7) is located on property owned by a person who withdraws, in writing, the permission granted pursuant to §21.150(b)(2) of this title (relating to Permits);

(8) is located in an area in which the activity has ceased in accordance with §21.145(b) of this title (relating to Cessation of Activities);

(9) is erected, repaired, or maintained in violation of §21.161 of this title (relating to Destruction of Trees/Violation of Control of Access);

(10) has been made more visible by the permit holder clearing vegetation from the highway right of way in violation of §21.161 of this title; or

(11) does not have permit plates properly attached under §21.150(b) and (f) of this title (relating to Permits).

(j) Removal. If a permit expires without renewal, is canceled without reinstatement, or if a sign other than an exempt sign is erected or maintained without a permit, the owner of the involved sign and sign structure shall, upon written notification by the district engineer, remove the sign at no cost to the state.

(k) Notice and appeal. Upon determination that a permit should be canceled, the director shall mail by certified mail a notice of cancellation to the address of the record license holder. Notice shall be presumed to be received five days after mailing. The recipient of the notice may provide proof that the notice was not received five days from mailing, in which case, the director of right of way may extend the time for requesting a hearing.

(1) The notice shall clearly state:

(A) the reason for the cancellation;

(B) the effective date of the cancellation; and

(C) the right of the permit holder to request an administrative hearing on the question of the cancellation.

(2) A request for an administrative hearing under this subsection must be made in writing to the director within 10 days of the receipt of the notice of cancellation.

(3) If timely requested, an administrative hearing shall be conducted in accordance with §§1.21 et seq. of this title (relating to Contested Case Procedure), and shall serve to abate the cancellation unless and until that cancellation is affirmed by order of the commission.

(l) Nonprofit signs.

(1) A nonprofit organization may obtain a permit under this section to erect or maintain a nonprofit sign.

(2) In order to qualify for a permit issued under this subsection, a sign must comply with all applicable requirements under this subchapter from which it is not specifically exempted.

(3) An application for a permit under this section must include, in detail, the content of the message to be displayed on the sign. Prior to changing the message, the permit holder must obtain the approval of the district engineer in whose district the sign is maintained.

(4) If at any time the sign ceases to be a nonprofit sign, the permit will be subject to cancellation pursuant to subsection (i) of this section.

(5) If the holder of a permit issued under this subsection loses its nonprofit status or wishes to advertise or promote something other than the municipality or political subdivision, an outdoor advertising license must be obtained pursuant to §21.149 of this title (relating to Licenses), the permit must be converted to a permit for a sign other than a nonprofit sign, and the holder must pay the original permit and annual renewal fees set forth in subsection (g) of this section.

(6) A nonprofit organization that holds a valid permit for a nonconforming sign that would otherwise qualify for a permit under this subsection may convert its permit to one issued under this subsection.

(m) Conversion of rural road permits and registrations. The department will convert a registration issued under §21.431 of this title (relating to Registration of Existing Off-Premise Signs) or a permit issued under §21.441 of this title (relating to Permit for Erection of Off-Premise Sign) to a permit under this section if a highway previously regulated in accordance with Transportation Code, Chapter 394 becomes subject to control under the Act. A holder of a permit or registration converted under this subsection will not be required to pay an original permit fee under subsection (g) of this section; however, the permit must be renewed annually under subsection (d) of this section, on the date the renewal of the permit or registration issued under §21.431 or §21.441 would have been due. In the event a sign owner has prepaid registration fees, the outstanding prepayment will be credited to the sign owner's annual renewal fee. The department will issue permit plates to a holder of a permit or a registration converted under this subsection at no charge. In the event replacement plates are needed after the initial issuance, fees will be charged in accordance with this section.

(n) New highway or change in highway designation. Owners of signs that become subject to the Act because of the construction of a new highway or the change in designation of an existing highway must apply to the department for a permit and must obtain an outdoor advertiser's license pursuant to §21.149 of this title (relating to Licenses) within 30 days after being notified by the department that the sign has become subject to the Act. If the owner of the sign cannot be identified from information on the sign, notice may be given by prominently posting notice on the sign for a period of 30 days.

§21.154. Lighting and Movement of Signs.

(a) Lighting. Signs may be illuminated except for signs that contain, include, or are illuminated by:

(1) any flashing, intermittent, or moving light or lights, including any type of screen using animated or scrolling displays, [~~such as an LED (light emitting diode) screen or any other type of video display, even if the message is stationary,~~] except those giving only public service information such as time, date, temperature, weather, or similar information;

(2) lights that are:

(A) not effectively shielded so as to prevent beams or rays of light from being directed at any portion of the traveled ways of a regulated highway; and

(B) of such intensity or brilliance as to cause glare or vision impairment of the driver of any motor vehicle, or which otherwise interfere with any driver's operation of a motor vehicle; and

(3) lights that interfere with the effectiveness of, or obscure an official traffic sign, device, or signal.

(b) Moving parts. [~~Signs with intermittent messages are prohibited, including tri-vision signs with rotating slat messages.~~] A cutout on a sign may be animated if it:

(1) is not lighted or enhanced by reflective material so as to create the illusion of flashing or moving lights; or

(2) does not otherwise create a safety hazard to the traveling public.

(c) Reflective materials. Reflective paint and reflective disks may be used on a sign face unless they are determined by the department to:

(1) create the illusion of flashing or moving lights; or

(2) cause an undue distraction to the traveling public.

(d) Non-flashing neon lights may be used on sign faces, unless:

(1) the sign permit specifies an unilluminated sign structure; or

(2) the lights are determined by the department to cause an undue distraction to the traveling public.

§21.163. Electronic Signs.

(a) Electronic images. The department has determined that the use of an electronic image on a digital display device is not the use of a flashing, intermittent, or moving light for the purposes of any rule, regulation, and standard promulgated by the department or any agreement between the department and the Secretary of Transportation of the United States.

(b) Prohibitions. An electronic sign shall not:

(1) be illuminated by flashing, intermittent, or moving lights;

(2) contain or display animated, moving video, or scrolling advertising;

(3) consist of a static image projected upon a stationary object; or

(4) be a mobile sign located on a truck or trailer.

(c) Location of electronic signs.

(1) electronic signs may only be located along a regulated highway within the corporate limits of a municipality or within the extraterritorial jurisdiction of a municipality that pursuant to state law has extended its municipal regulation to include that area; and

(2) notwithstanding §21.160 of this subchapter, an electronic sign may not be relocated so that any part of the relocated sign would be within 1,500 feet of another sign on the same side of a regulated highway.

(d) Upgrading an electronic sign.

(1) lighting shall not be added to or used to illuminate nonconforming signs; and

(2) a legally conforming sign may be modified to an electronic sign if a new permit is obtained.

(e) Eligible electronic signs.

(1) electronic signs may be located on either side of the highway; however, each sign must only be visible from one direction of travel;

(2) each message on an electronic sign shall be displayed for at least eight seconds and a change of message shall be accomplished within two seconds;

(3) a change of message must occur simultaneously on the entire sign face; and

(4) an electronic sign may not include more than 20 different displays per cycle, excluding emergency displays and public service announcements.

(f) Safety. An electronic sign must:

(1) contain a default mechanism that freezes the sign in one position if a malfunction occurs; and

(2) automatically adjust the intensity of its display according to natural ambient light conditions.

(g) Owner responsibilities.

(1) the owner of an electronic sign shall coordinate with local authorities to display, when appropriate, emergency information important to the traveling public such as Amber Alerts, or alerts concerning terrorist attacks or natural disasters. Emergency information messages shall remain in the advertising rotation according to the protocols of the agency that issues the information;

(2) the sign owner shall provide to the department contact information for a person who is available to be contacted at any time and who is able to turn off the electronic sign promptly after a malfunction occurs; and

(3) If the department finds that an electronic sign causes glare or otherwise impairs the vision of the driver of a motor vehicle or otherwise interferes with the operation of a motor vehicle, the owner of the sign, within one hour of a request by the department, shall reduce the intensity of the sign to a level acceptable to the department.

(h) Granting permits. The department will grant a permit for an electronic sign if the application for the permit:

(1) satisfies the requirements of this subchapter; and

(2) has attached to it:

(A) a certified copy of the permit issued by the municipality; or

(B) if the municipality does not issue permits, a certified copy of written permission for the sign from the municipality.

(i) Conflicts with subchapter. All regulations provided by this subchapter apply to electronic signs, except if this section conflicts with another provision of this subchapter, this section controls.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703883
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

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SUBCHAPTER K. CONTROL OF SIGNS ALONG RURAL ROADS

43 TAC §21.441, §21.551

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §391.032, which grants the commission the authority to regulate the orderly and effective display of outdoor advertising along a regulated highway within the state and Transportation Code, §394.004, which grants the commission the authority to promote and control the reasonable, orderly, and effective display of outdoor advertising on all highways and roads.

CROSS REFERENCE TO STATUTE

Transportation Code, §§391.021, 391.022, 391.032, and 394.004.

§21.441. Permit for Erection of Off-Premise Sign.

(a) Applicability. A person shall not erect or cause to be erected an off-premise sign, other than an exempt sign, that is visible from the main-traveled way of a rural road without first having obtained a permit to do so from the commission acting by and through the district engineer of the department district office serving the county in which the proposed sign is to be located.

(b) Application and issuance.

(1) A sign owner who desires to erect or maintain a sign as required in this section must file an application, in duplicate, in a form prescribed by the department, which shall include, but not be limited to:

(A) the name and mailing address of the applicant;

(B) proposed location and description of the sign;

(C) how to find the road along which the sign is to be erected;

(D) name and address of the site owner;

(E) indication that the site owner has consented to the erection of the sign; and

(F) such additional information as the department deems necessary.

(2) The application must be signed under oath by the sign owner and filed with the district engineer in whose district the sign is to be erected, and shall be accompanied by:

(A) the prescribed fee or fees; and

(B) if the outdoor advertising is located within the jurisdiction of a municipality with a population of more than 1.9 million, a certified copy of the permit for the sign issued by the municipality; and

(C) [~~(B)~~] if the proposed sign will have a height of six feet or more above the ground, as measured above the average level of the ground adjacent to the proposed structure, a certificate signed by the sign owner to the effect that the proposed sign will withstand wind load pressures in pounds per square foot as set out in the following table.
Figure: 43 TAC §21.441(b)(2)(C)
[~~Figure: 43 TAC §21.441(b)(2)(B)~~]

(3) Before approving a permit application, the district engineer shall determine that the proposed sign will:

(A) be located within 800 feet of a recognized commercial or industrial activity located on the same side of the roadway;

(B) be located along a roadway subject to control under these sections;

(C) meet all applicable requirements of the sections under this undesignated head; and

(D) not be subject to control under the Texas Litter Abatement Act.

(4) If approved, a copy of the application will be endorsed by the district engineer and returned to the applicant along with a permit number. Within 30 days after it is received, the permit number shall be displayed on the sign structure in the following manner:

(A) legibly displayed on the edge of the sign structure nearest the roadway; and

(B) in numerals with a minimum height of two inches and minimum width of one inch.

(c) Permit renewals.

(1) Subject to the terms and location stated in the permit application, a permit issued under this section shall be valid for a period of one year, provided the sign is erected and maintained in accordance with the applicable sections under this undesignated head. The permitted sign must be erected within one year from the date the original permit is issued in order for a sign permit to be eligible for renewal.

(2) To renew a permit under this subsection, a permit holder must file with the district engineer a written request in a form prescribed by the department, together with the prescribed renewal fee; and further provided that the sign continues to meet all applicable requirements.

(d) Permit transfer.

(1) A permit may only be assigned with the written approval of the district engineer.

(2) The holder of a permit or permits who desires to transfer one or more permits must file with the district engineer a request in a form prescribed by the department, together with the prescribed transfer fee. The transferor and transferee will each be issued a copy of the approved permit transfer form.

(e) Permit fees.

(1) For a permit issued pursuant to this section:

(A) the original fee is $96 for each sign;

(B) the annual renewal fee is $40; and

(C) the fee is $25 for each permit transferred.

(2) A fee prescribed in this subsection is payable to the State of Texas, and is nonrefundable.

§21.551. Prohibited Signs.

(a) No sign may be erected within the right-of-way of any rural road nor within what would be the right-of-way if the right-of-way boundary lines were projected across an area of railroad right-of-way, utility right-of-way, or road right-of-way not owned by the state or any political subdivision thereof.

(b) No sign shall be erected which contains or is illuminated by any flashing, intermittent, or moving light except a sign giving solely public service information such as time, date, temperature, or weather.

(c) No sign shall be so illuminated that it interferes with the effectiveness of, or obscures, an official traffic sign, device, or signal.

(d) No sign shall be erected or contain a display which imitates or resembles any official traffic sign, signal, or device.

(e) No sign may be erected or maintained upon a tree or painted or drawn upon rocks or other natural features.

(f) No sign may be erected that uses any type of screen using animated or scrolling displays even if the message is stationary.

(g) No digital sign including a sign, display or device that changes the message or copy on the sign by electronic processes may be erected.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703884
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

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CHAPTER 23. TRAVEL INFORMATION

The Texas Department of Transportation (department) proposes amendments to §23.2, Definitions and §23.14, Display of Travel Literature in the Texas Travel Information Centers; the repeal of §23.26, Magazine Discount Card Program; and amendments to §23.27, Magazine Ancillary Products and §23.29, Magazine Advertising.

EXPLANATION OF PROPOSED REPEALS AND AMENDMENTS

Transportation Code, Chapter 204 directs the department to promote travel and tourism by operating Texas Travel Information

Centers and publishing the official travel magazine of the state, *Texas Highways*.

The proposed amendments to §23.2, Definitions, delete definitions for terms and words that are no longer used in the rules.

Section 23.14, Display of Travel Literature in the Texas Travel Information Centers, is amended to correct grammar, to update the name of an agency, and to offer additional clarification on the types of literature and other promotional items that can be distributed at Travel Information Centers. Confusion has arisen recently regarding the type of literature and items that may be distributed at Travel Information Centers. These proposed amendments are necessary to ensure that literature and items distributed will serve the purpose of promoting travel and tourism in Texas.

Section 23.26, Magazine Discount Card Program, is being repealed because the program is being discontinued. Each year, the costs of the program, including paper and postage, have increased steadily while the number of participating merchants and actual usage of the discount card have declined.

Section 23.27, Magazine Ancillary Products, is amended to expand the list of the types of products the department may sell through *Texas Highways* magazine. Section 23.29, Magazine Advertising, is amended to add new advertising categories for *Texas Highways* magazine as well as banner advertising for the magazine's web site. These proposed amendments will enhance the potential to increase revenues for the magazine, which has a legislative mandate to break even. The additional product categories mirror those products offered by the State of Arizona's official travel magazine, whose ancillary product program has become one of the most successful programs among regional magazine publishers. The wider variety of products will increase the likelihood that a customer will return more frequently to consider an array of product choices. The new magazine advertising categories conservatively add only a handful of categories, representing areas where the magazine can attract additional advertisers without sacrificing editorial integrity. Adding banner advertising to the magazine's web site is essential to attracting advertisers interested in reaching a larger audience than just the magazine readers. In terms of process, little will change. The magazine already has a third party contracted vendor that sells advertising. In terms of ancillary products, the program is managed in-house; and staff will simply review additional categories according to the rule proposals already outlined.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that, for each of the first five years the repeals and amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed repeals and amendments. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Doris Howdeshell, Director, Travel Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed repeals and amendments.

PUBLIC BENEFIT

Ms. Howdeshell has also determined that, for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the proposed repeals and amendments is that the increased revenue from advertising will improve the department's ability to promote travel and tourism in the state without increasing the cost to taxpayers. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §23.26, and amendments to §§23.2, 23.14, 23.27, and 23.29 may be submitted to Doris Howdeshell, Director, Travel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 8, 2007.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §23.2

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating Travel Information Centers and publishing the state's official travel magazine.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

§23.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

~~[(1) Card--Texas Highways Travel Discount Card.]~~

(1) [~~(2)~~] Commission--The Texas Transportation Commission.

(2) [~~(3)~~] Department--The Texas Department of Transportation.

(3) [~~(4)~~] Director--The director of the Travel Division.

(4) [~~(5)~~] Display case--An enclosed structure, provided by the department and located at a Travel Information Center, with space for backlit photographic transparencies and small pieces of artwork and items of interest.

(5) [~~(6)~~] Division--The Travel Division of the Texas Department of Transportation.

(6) [~~(7)~~] Magazine--*Texas Highways* magazine.

(7) [~~(8)~~] Metropolitan area--A group of cities in a large urban area.

~~[(9) Program--Texas Highways Magazine Discount Card Program.]~~

(8) [~~(10)~~] Promotional graphics, photographs and icons--Artwork, video, still photographic images and transparencies, paraphernalia, and items of interest which depict the theme or image of the region's or metropolitan area's travel and tourism attraction or allure.

(9) [~~(11)~~] Promotional posters--Artwork, still photographic images, and transparencies which depict or promote a particular event, city, region, or attraction.

(10) [~~(12)~~] Purchaser--A person who purchases a *Texas Highways* magazine product.

(11) [~~(13)~~] Purchaser and subscriber mailing list--A list that contains the names and addresses of purchasers and subscribers.

(12) [~~(14)~~] Region--A geographic area within the state of Texas with a common feature or theme and that is readily recognized as a single entity.

(13) [~~(15)~~] Subscriber--A person who pays a fee to receive *Texas Highways* magazine by mail.

(14) [~~(16)~~] Travel and tourism--Scenic, cultural, artistic and historical points of interest, public and private leisure and recreation attractions, and parks located within the official boundaries of the state of Texas.

(15) [~~(17)~~] Travel Information Center--A recognized location where travel literature and travel counseling are provided by the department's trained professional travel counselors, strategically located in buildings designated with signs, some with adjoining rest areas, on key highways entering the state, at the historical site of Judge Roy Bean's court at Langtry, and in the Capitol Complex Visitor Center in Austin.

(16) [~~(18)~~] Travel literature--Maps, pamphlets, brochures, documents, guidebooks, bulletins, or other printed materials and electronic media, except *Texas Highways* magazine, that are designed to inform the public, stimulate travel to and within the state of Texas, and publicize points of interest, recreational grounds, scenic places, historical facts, or other items of interest and value to the traveling public.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703885
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

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SUBCHAPTER B. TRAVEL INFORMATION

43 TAC §23.14

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating Travel Information Centers and publishing the state's official travel magazine.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

§23.14. Display of Travel Literature in the Texas Travel Information Centers.

(a) Purpose. This section establishes the policies and procedures governing the acceptance, display, and distribution of travel literature and other promotional items by the department's travel information centers.

(b) Definition. For purposes of this section the term "travel literature" includes descriptive materials, pamphlets, booklets, videos, photos, icons, and promotional items.

(c) Policy for racks and display cases.

(1) General. Travel literature accepted and displayed in a travel information center:

(A) must be approved for display by the director or the director's designee;

(B) must be 100% travel and tourism-oriented;

(C) must be of a professional quality; and

(D) may contain coupons, prizes, or contests related to travel and tourism.

(2) Subject matter. Travel literature must contain subject matter relating to:

(A) recreation;

(B) scenic areas;

(C) historic sites;

(D) the arts, including museums;

(E) fairs, festivals, or special events of public interest;

(F) accommodations, including, but not limited to, bed and breakfasts and guest ranches;

(G) restaurants;

(H) shopping centers, malls, or outlet stores;

(I) RV parks and campgrounds;

(J) city, county, state, and national parks;

(K) travel maps or public transportation information; or

(L) traveler safety.

(3) Size. Travel literature must meet size criteria established by the division.

(d) Policy specific to display cases.

(1) Acceptance. An organization or individual may submit a proposal for the use of promotional graphics, photographs, icons, and other promotional items in a display case to promote Texas travel and tourism opportunities. Proposals will be accepted on a first-come, first-served [~~first come, first served~~] basis. Displays will be rotated and a waiting list per location will be established.

(2) Agreement. Prior to the department accepting materials for use in a display case, the individual or organization must enter into a written agreement with the department for a period of not less than six months.

(3) Content. Display case materials shall focus on promoting tourism that stimulates travel to a [~~specific region or~~] metropolitan area or specific region, and shall not contain:

(A) dated material; or

(B) special events, promotions, or facilities that are only open to groups and not individuals.

(4) Cost. Materials for display cases must be provided to the department free of charge.

(5) Specifications. An individual or organization submitting materials approved for display shall provide:

(A) five horizontal transparencies which are 16 inches high and 20 inches wide;

(B) six horizontal transparencies which are 11 inches high and 14 inches wide; and

(C) three vertical transparencies which are 11 inches wide and 14 inches high.

(e) Unacceptable travel literature. In addition to the requirements of subsections (c) and (d) of this section, the department will not accept travel literature that:

(1) is solely for the purpose of selling a single, tangible item, including, but not limited to, a brochure selling a tape, CD, magazine, or cookbook, with the exception of *Texas Highways* [~~Texas Highways~~], the state's official travel magazine;

(2) is solely for the purpose of selling a membership;

(3) [~~(2)~~] is solely for the purpose of promoting facilities or other subjects not directly related to travel and tourism;

(4) [~~(3)~~] contains terminology, advertising, or pictures that are adult or sexually-oriented or are otherwise not directly related to family-oriented travel or tourism;

(5) [~~(4)~~] promotes or describes in-state locations, destinations, facilities, accommodations, or attractions not regularly accessible (open) to the general public year-round except for attractions or destinations that open seasonally because of weather conditions;

(6) [~~(5)~~] is for display on the wall, including but not limited to, a poster or banner; or

(7) [~~(6)~~] is for the purpose of promoting out-of-state travel and tourism activities, destinations, facilities, attractions, and services that do not augment Texas travel and tourism, unless the travel literature:

(A) is regional and contains 51% or more information on Texas travel and tourism;

(B) is an accommodation guide which has hotel/motel information on Texas properties along with hotel/motel information on other states; or

(C) concerns the City of Texarkana, which is located in both Texas and Arkansas and shares a single chamber of commerce, and produces a combined information brochure.

(f) Display and distribution.

(1) Display. Private sector travel literature will be:

(A) displayed in a manner which the travel information center supervisor believes is the most efficient and informative for the visitor;

(B) displayed in a manner which gives more exposure to destinations near the travel information center or to destinations in high demand;

(C) displayed in season, if it is of a seasonal nature; and

(D) rotated periodically to provide exposure for all travel interests.

(2) Updating travel literature. New private sector travel literature will replace the old travel literature on display when a new date appears on the brochure or when substantial changes have been made to the item. Outdated travel literature will not be sent back to the original establishment, but will be disposed of through a recycling program or the most appropriate manner.

(3) Promotional items. Promotional posters or items will not be accepted for display or distribution without the written approval of the director or the director's designee.

(g) Vending machines. The sale of souvenirs and other related commercial items is prohibited at the travel information centers. In accordance with Title 23, Code of Federal Regulations, Part 752, the department may permit vending machines in centers for the purposes of dispensing food, drink, and other articles that it determines appropriate and desirable. No charge to the public may be made for goods and services except for telephone and articles dispensed by such vending machines. The Texas Department of Assistive and Rehabilitative Services, Division for Blind Services [~~Texas Commission for the Blind~~] has first right of refusal to operate vending machines in travel information centers.

(h) Non-department use of travel information centers.

(1) Request. An organization or individual wanting to do an on-site promotion at a travel information center rest area must submit a request in writing. Requests will be accepted on a first-come, first-served [~~first come, first served~~] basis.

(2) Agreement. Prior to the department allowing on-site promotions, the organization or the individual must enter into a written agreement with the department agreeing to abide by the requirements of this subsection.

(3) Activity.

(A) Rest stop activities shall be conducted in a manner which will cause the least interference with the travel information center's operation and picnic or rest area.

(B) Alcoholic beverages are prohibited.

(C) All non-alcoholic refreshments and or promotional items offered at the rest stop must be free of charge to visitors.

(D) All promotional items must meet requirements of subsections (c) and (e) of this section and be offered free of charge to visitors.

(4) Signs.

(A) The organization or individual shall prominently display a sign indicating that all drinks, refreshments, services, and items provided are free of charge.

(B) Any signs associated with the refreshment rest stop, with the exception of those stated in subparagraph (A) of this paragraph, shall be limited to only those necessary to identify the organization and normal ownership signs permanently affixed to trailers, vehicles, tents, and other equipment directly associated with the operation of the rest stop.

(C) Any signs to be used or installed for the refreshment rest stop, including advance signs advising motorists of the refreshment rest stop, must receive prior approval of the director or the director's designee. An approved sign may not be attached to or interfere with the travel information center's operation or highway signs.

(5) Services. The department will not furnish utilities, except where explicitly designed to be provided for this purpose.

(6) Cleanup. Cleanup of the facilities used for the refreshment rest stop during and immediately afterward is the responsibility of the organization.

(7) Compliance. The department will monitor or check periodically for compliance with the requirements of this subsection.

Noncompliance may call for immediate cancellation of refreshment rest stop activities and may be the basis for refusing future requests.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703886
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

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SUBCHAPTER C. TEXAS HIGHWAYS MAGAZINE

43 TAC §23.26

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating Travel Information Centers and publishing the state's official travel magazine.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

§23.26. Magazine Discount Card Program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703887
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

♦ ♦ ♦

43 TAC §23.27, §23.29

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, Chapter 204, which requires the department to promote travel and tourism in the state by operating Travel Information Centers and publishing the state's official travel magazine.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 204.

§23.27. Magazine Ancillary Products.

(a) Purpose. Texas Civil Statutes, Article 6144e, authorizes the department to sell promotional items such as calendars, books, prints, caps, [~~light~~] clothing, or other items that advertise the resources of Texas. This section sets forth department policies and procedures relating to the selection, pricing, and sale of these products through *Texas Highways* [~~Texas Highways~~] magazine.

(b) Products. A product may be designed and produced by the department or purchased for resale.

(1) Product types. A product may be:

(A) maps, other printed materials, and audio visual items, including video, [~~audio cassettes, and~~] CD ROMS, and DVDs;

(B) calendars, postcards, seasonal cards, reprints, note cards, prints, binders, stationery, and bound volumes;

(C) books;

(D) clothing and apparel accessories [~~light clothing, including T-shirts, caps, and aprons~~];

(E) desk accessories;

(F) travel related products;

(G) holiday items;

(H) home décor;

(I) jewelry and accessories;

(J) outdoor accessories;

(K) Texas kitchen items;

(L) [~~(E)~~] other promotional items, including tote bags, mugs, license plate wrap-arounds, jigsaw puzzles, [~~and~~] holiday ornaments, games; and

(M) [~~(F)~~] other items approved by order of the commission.

(2) Product qualifications. A product must convey a positive image of the scenic, recreational, historical, geographical, cultural, or artistic treasures of Texas.

(c) Selection panel. The director will appoint a selection panel consisting of division employees to set prices and recommend products.

(d) Product selection.

(1) The department may seek products for consideration through market analysis.

(2) A vendor, at any time, may tender a request for consideration by sending a sample of the product with a written request for consideration that includes:

(A) product description, including composition;

(B) location of manufacturer;

(C) wholesale unit price;

(D) suggested retail price;

(E) selling history and performance if product has been previously marketed;

(F) inventory production capabilities;

(G) method of delivery; and

(H) proof of ownership or rights to market.

(3) Upon review of market survey results or a request for consideration, the selection panel will:

(A) authorize a supplier search if necessary; and

(B) review a summary of the information described in paragraph (2) of this subsection.

(4) The selection panel will recommend a product based upon:

(A) its conveyance of scenic, recreational, historical, geographical, cultural, or artistic resources of Texas;

(B) projected sales potential;

(C) revenue-generating potential;

(D) quality;

(E) value;

(F) uniqueness;

(G) presentation potential;

(H) visual appearance;

(I) delivery schedule;

(J) production capacity; and

(K) compatibility with the existing product line.

(5) The director will approve or disapprove the selection panel's recommendation. The director's decision is final.

(6) The vendor will be informed of the department's decision in writing. All samples submitted for review become the property of *Texas Highways* unless specified otherwise in advance. Return request of samples must be accompanied by a pre-paid UPS return label. Arrangements for personal pick-up may also be made. [~~If a product is not approved, the department will return all samples and informational materials submitted by the vendor.~~]

(7) If the product is designed by and produced for the department, the department will obtain bids to produce the product in accordance with Government Code, Chapters 2155-2158.

(e) Contract with vendor. A vendor whose product is selected will enter into a contract with the department. The contract will include, but is not limited to:

(1) the description of the product;

(2) the quantity to be provided;

(3) payment terms;

(4) marketing and distribution terms, if applicable;

(5) the delivery schedule;

(6) the return policy;

(7) the contract period;

(8) the termination date; and

(9) intellectual property rights, including a licensing agreement, if applicable.

(f) Pricing. All prices advertised by the magazine will be subject to change without notice.

(1) Products. The selection panel will set prices of products.

(2) Shipping and handling. Shipping and handling fees will be added to orders to offset the cost of distribution.

(3) Sales taxes. Applicable sales taxes will be added to the price of the products.

(4) Payments. Payments for all sales must be made in United States funds payable in cash, check, money order, purchase order, or credit card.

(g) Refunds and complaints. Refunds, less shipping and handling, will be made upon return of the purchased merchandise, provided it is in the same condition as when received by the purchaser and includes sales receipt or proof of purchase. Complaints about merchandise may be directed to the director.

(h) Mailing list. The department will maintain a mailing list of vendors who express an interest in supplying products. When the department determines that new products are needed, the department will notify those on the mailing list.

(i) Discontinuance. The department may choose to discontinue a product at any time. All products must achieve an acceptable level of sales activity [~~within three months of active marketing effort~~] by the department to be considered for continued representation.

§23.29. Magazine Advertising.

(a) Purpose. Transportation Code, Chapter 204 authorizes the department to publish *Texas Highways*, the state's official travel magazine, and other travel literature for the purpose of assisting and encouraging travel in Texas. In furtherance of that purpose, the department may include certain paid advertising in travel literature, provided that the quality and quantity of the primary information content is not impaired. This section prescribes department policies and procedures relating to the advertising content of *Texas Highways* magazine.

(b) Acceptable subjects. Subjects acceptable for advertising in *Texas Highways* and the magazine's web site include:

(1) Texas vacation, recreational, travel, or tourism-related sites, facilities, destinations, accommodations, restaurants, events, equipment, and services;

(2) Texas shopping opportunities related to destinations, food products, and Texas-related products;

(3) pleasure-driving equipment, facilities, destinations, and services;

(4) camping, hiking, fishing, birding, boating, bicycling, gardening, photography, wildlife viewing, astronomy, geology, and other outdoor events, sites, equipment, facilities, and services;

(5) public transportation modes, products, facilities, and services; [~~and~~]

(6) financial, media, and higher education services related to Texas institutions;

(7) real estate developments related to recreational and retirement living; and

(8) [~~(6)~~] other sites, products, equipment, facilities, and services that are travel related or Texas based, and that are determined by the department to be of cultural, educational, historical, or recreational interest to *Texas Highways* readers.

(c) Unacceptable subjects. Advertising subjects not acceptable in *Texas Highways* include:

(1) out-of-state travel-tourism locations, destinations, facilities, and services that do not augment Texas travel or tourism or that are not located on border locations with ties to Texas;

(2) alcoholic beverages;

(3) tobacco products; and

(4) sexually-oriented products and services.

(d) Advertising sales and solicitations.

(1) Mailing list. Any entity or individual interested in advertising in *Texas Highways* magazine will be included in the department's mailing list upon request. The department will annually publish in the *Texas Register* an invitation to be added to the mailing list and to receive advertising rate information.

(2) Publication of advertiser information. The department will calculate advertising rates and develop a rate card for *Texas Highways* magazine. The department will publish the information on a continuous basis in the Standard Rate and Data Service, Consumer Magazine and Agri-Media Source. The department will also publish the advertising rate information annually in the *Texas Register*.

(3) Contents of the rate card. The rate card will include information about:

(A) advertising space and positions;

(B) advertising rates;

(C) publication issue and closing dates;

(D) circulation data;

(E) publisher's editorial profile; and

(F) other related information.

(4) Procedure for selling advertising.

(A) The department and/or its designated agent will send an announcement of advertising opportunities and the rate card to those on the mailing list 30 days after publication in the *Texas Register*.

(B) The department or its designated agent will subsequently send a rate card upon request to an entity or individual not on the mailing list.

(C) The department or its designated agent will accept all insertion orders (orders for paid advertising) received prior to the closing date on a first-come, first-served basis until all advertising space for a particular issue is filled. All insertion orders will be stamped with the date as they are received. Insertion orders for an inside front cover spread and inside back cover spread will take precedence over an inside front cover and inside back cover insertion order, notwithstanding the date of receipt of the insertion order.

(D) Reminders of advertising space deadlines and rates may be sent to those on the mailing list at the discretion of the department if advertising space remains available prior to space closing deadline.

(e) Restrictions.

(1) The department will not accept advertising it considers to be misleading or a misrepresentation of facts.

(2) The department will not accept advertising from an entity that discriminates against customers on the basis of race, color, creed, religion, sex, or national origin.

(3) The director may remove an advertiser based on the department's receipt of three or more consumer complaints concerning service or merchandise. The department will send a written notice of noncompliance to the advertiser. If the director determines the complaints are valid and they remain unresolved after 90 days, the director will remove the advertiser from *Texas Highways* magazine, and will no longer accept insertion orders from that advertiser. An advertiser may appeal the removal to the department's executive director, or the executive director's designee, not below the level of division director, whose decision is final.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703888
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER N. MEMORIAL SIGN PROGRAM FOR VICTIMS OF IMPAIRED DRIVING

43 TAC §§25.950 - 25.957

The Texas Department of Transportation (department) proposes new §25.950, purpose; §25.951, definitions; §25.952, application; §25.953, determination of program eligibility; §25.954, fee; §25.955, sign description; §25.956, sign installation and replacement; and §25.957, sign removal; all concerning the creation of a memorial sign program for victims of impaired driving.

EXPLANATION OF PROPOSED NEW SECTIONS

House Bill 2859, 80th Legislature, Regular Session, 2007, requires the Texas Transportation Commission (commission) to establish and administer by rule a memorial sign program to memorialize those persons killed in highway crashes involving alcohol or controlled substances.

The legislation defines various aspects of how this program will operate including the text required on the signs, that participants will pay a fee to have such a sign installed, and that an operator of a vehicle killed while under the influence of alcohol or a controlled substance is not eligible for participation.

Section 25.950, Purpose, defines the purpose of the new subchapter as the implementation of Transportation Code, §201.909, and creation of a Memorial Sign Program for Victims of Impaired Driving.

Section 25.951, Definitions, defines certain terms and words used in the new rules, including "impaired" which is defined as being under the influence of alcohol or a controlled substance while operating a vehicle. This definition includes all the requirements of Transportation Code, §201.909.

Section 25.952, Application, describes how a person may apply for a sign under this rule. The section requires the person requesting the sign to provide basic information about the crash. The applicant may also be asked to submit a motor vehicle accident report if the report is not on file with the department. If the accident report does not indicate that the crash occurred as a result of impaired driving, the applicant is allowed to provide additional supporting documents to establish eligibility.

Section 25.953, Determination of Program Eligibility, details how the department will determine eligibility for participation in the program. The statute requires that the accident "involve alcohol or a controlled substance" it does not require that the vehicle operator be intoxicated. The department will look initially to the accident report to determine if the investigating officer noted that the driver of one of the vehicles involved in the crash was impaired or that drinking was a factor in the crash and if the crash occurred on the state highway system. If the information necessary to make a determination is not on the accident report, this section allows the department to consider other supporting governmental records submitted by the applicant. As required by the statute this section provides that a person is not eligible to be memorialized if the person was operating a vehicle while under the influence of alcohol or a controlled substance. The department will use the accident report and any other governmental records submitted to the department to determine if the operator was impaired.

Additionally, §25.953, provides that only one sign may be installed for a crash victim. A victim for whom a sign is approved and installed is not eligible to have a subsequent sign, other than a replacement sign, approved.

Section 25.954, Fee, establishes a $300 fee for each sign installed under this subchapter. The department has determined the size of the sign based on the required text and the size of the font needed to be legible. The fee is based on the state's average cost for similar sized signs. The fee is payable to the department once the application is approved, and must be received prior to the installation of the sign.

Section 25.955, Sign Description, describes the text of the sign, tracking the requirements of Transportation Code, §21.909(c). The section notes that each sign will display only one name or one family name due to safety concerns and size limitations. A sign placed in the state right of way needs to be easy to read therefore the font size is determined by the size of the sign. If an applicant wants the first and last names of more than one victim the applicant may request individual signs memorializing each victim.

Section 25.956, Sign Installation and Replacement, describes the installation and replacement process. The signs can only be installed on state highway system rights of way. The department does not have the authority to place signs on city streets or county roads.

The sign will be installed as near as is practical to the actual location of the crash. In determining the exact location of the sign the department will consider available space on state highway right of way as well as the safety of the traveling public.

A sign that is damaged or destroyed will be replaced if the applicant pays an additional fee to cover the cost of a new sign. The department will replace a sign damaged by the department at no cost to the applicant.

Section 25.957, Sign Removal, provides the process for the removal of the sign. A sign installed under the program will remain in place for one year. The sign will be removed on the first anniversary of the date the original sign was installed.

The replacement of a sign does not extend the one year posting period. The one year period will not be extended past the anniversary of the installation regardless of how long between the damage to the original sign and the installation of the replacement.

The department will notify the applicant of the removal of the sign and provide necessary information on how the applicant can obtain the sign. The applicant will have 30 days after notification to take possession of the sign. If the applicant does not take possession within the 30 day period, the department will destroy the sign.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new sections as proposed are in effect, there will be no fiscal implications for state or local governments. There are no anticipated economic costs for persons required to comply with the sections as proposed. Participation in the program is strictly voluntary; there will only be costs to persons who choose to submit an application.

Carlos Lopez, P.E., Director, Traffic Operations Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT

Mr. Lopez has also determined that for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be greater public awareness of the dangers associated with operating a vehicle while under the influence of alcohol or a controlled substance. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on §§25.950 - 25.957 may be submitted to Carlos Lopez, P.E., Director, Traffic Operations Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 8, 2007.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of work within the department, and more specifically, Transportation Code, §201.909, which authorizes the commission to adopt rules to administer that section.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.909.

§25.950. Purpose.

Transportation Code, §201.909, requires the department to establish and administer a memorial sign program to publicly memorialize the victims of alcohol or controlled substance-related vehicle crashes.

§25.951. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Applicant--A person requesting a sign under the Memorial Sign Program for Victims of Impaired Driving in accordance with this subchapter.

(2) Department--The Texas Department of Transportation.

(3) Impaired--Under the influence of alcohol or a controlled substance while operating a vehicle.

(4) State highway system--The system of highways in the state included in a comprehensive plan approved by the Texas Transportation Commission, in accordance with Transportation Code, §201.103.

§25.952. Application.

(a) A person may request the construction and installation of a sign memorializing a victim of an alcohol or controlled substance-related vehicle crash by following the procedures set out in this subchapter.

(b) The applicant must submit on a form provided by the department an application that contains the following information:

(1) the name of the victim;

(2) the location of the crash;

(3) the date of the crash;

(4) the name and contact information of the applicant; and

(5) the name of one of the vehicle operators involved in the crash.

(c) If the department notifies the applicant that a copy of the officer's accident report required to be submitted to the department by the reporting law enforcement agency under Transportation Code, §550.062, is not on file with the department, the applicant must submit a copy of that report.

(d) The applicant may provide to the department additional government documents relating to the crash if necessary to establish that a driver was impaired.

§25.953. Determination of Program Eligibility.

(a) The officer's accident report for the crash will be used by the department to determine eligibility for a memorial sign.

(b) If the officer's accident report does not indicate that the driver of one of the vehicles was impaired or that drinking was a factor or condition of the accident, the department will review other governmental records provided by the applicant to determine eligibility for a memorial sign.

(c) To be eligible for a sign the officer's accident report must indicate that the crash occurred on the state highway system.

(d) A person is not eligible for a memorial sign if the victim was operating a vehicle involved in the crash and the officer's accident report or another submitted governmental document shows that the victim was impaired at the time of the crash.

(e) A victim may be memorialized by only one sign, excluding a replacement sign, installed under the Memorial Sign Program for Victims of Impaired Driving. The department will deny an application for a victim that is submitted after an application for the same victim has been approved.

§25.954. Fee.

(a) A fee for a memorial sign under this subchapter is $300.

(b) Upon approval of the application, the applicant must remit the fee to the department before construction of the sign may begin.

§25.955. Sign Description.

(a) The department is unable to accommodate the name of more than one victim on a sign, except that, if more than one victim shares the same family name, a sign may display the family name of the victims.

(b) A sign will have a blue background with a white legend and include the following elements:

(1) the phrase "Please Don't Drink and Drive";

(2) the phrase "In Memory of";

(3) one line of text denoting the name of the victim or, if the family name of the victims is to be displayed, the phrase "The (family name) Family"; and

(4) the date of the crash.

§25.956. Sign Installation and Replacement.

(a) A sign may be installed under this subchapter only on state highway system right-of-way.

(b) The department will install the sign as near the crash location as practical. In determining the sign location, the department will consider:

(1) the safety of the traveling public; and

(2) available space on state right-of-way for the sign.

(c) If the sign is damaged, vandalized, or destroyed, during the one-year period beginning on the date that the sign is installed, the department will reinstall the sign only if the applicant pays a replacement fee to cover the cost of the replacement sign. The amount of the replacement fee is equal to the amount of the fee set under §25.954 of this subchapter (relating to Fees).

(d) The department will replace a sign that is damaged by the department without the payment of the replacement fee.

§25.957. Sign Removal.

(a) The department will remove a sign installed under the Memorial Sign Program for Victims of Impaired Driving or its replacement on the first anniversary of the date that the original sign was installed.

(b) The department will notify the applicant after the sign has been removed. The notice will provide information on how the applicant may take possession of the sign. If the applicant fails to take possession of the sign within 30 days after the date on which notice is given under this subsection, the department will destroy the sign.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703889
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

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CHAPTER 27. TOLL PROJECTS
SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS

43 TAC §27.4, §27.10

The Texas Department of Transportation (department) proposes amendments to §27.4, concerning solicited proposals and new §27.10, concerning the formula for determining compensation upon the department's termination for convenience of a comprehensive development agreement under which a private partici-

pant receives the right to operate and collect revenue from a toll project.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

Senate Bill 792, enacted by the 80th Legislature, Regular Session, 2007, amended Transportation Code, §223.203(m) to make the payment of a stipend to an unsuccessful private entity for work product contained in a proposal permissive rather than mandatory.

The amendments to §27.4(f), Solicited Proposals, are made to comply with the provisions of Senate Bill 792 by specifying that the request for proposals may stipulate an amount of money that will be paid for work product. Section 27.4(f) has been further amended by adding new paragraphs (1), (2), and (3), which set forth the specific criteria the Texas Transportation Commission (commission) will consider in determining whether to approve the payment of a stipend.

Transportation Code, §371.101 requires a toll project entity having rulemaking authority by rule to develop a formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project. A formula must calculate an estimated amount of loss to the private participant as a result of the termination for convenience. The formula must be based on investments, expenditures, and the internal rate of return on equity under the agreed base case financial model as projected over the original term of the comprehensive development agreement, plus the agreed percentage markup on that amount. A formula may not include any estimate of future revenue from the project that is not included in the agreed base case financial model.

New §27.10(a), Purpose, describes the purpose of this section, which is to prescribe the formula required by Transportation Code, §371.101 that shall be used in comprehensive development agreements subject to that section.

New §27.10(b), Definitions, defines words and terms used in the new section.

To implement Transportation Code, §371.101, new §27.10(c) Compensation amount, prescribes the formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project. New §27.10(c) requires a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project to provide that, if the department chooses to exercise its option to terminate for convenience the comprehensive development agreement and lease, the compensation to the private participant respecting the termination may not exceed the amount determined under the formula prescribed in that section.

As authorized by Transportation Code, §371.101, the formula prescribed in §27.10(c) is based on (and the compensation is limited to) investments (senior debt termination amount), expenditures (demobilization costs and costs to provide training, instruction, and assistance to the department or its designees in the use and operation of project systems and programs as part of the transition of operations resulting from the termination for convenience), and the internal rate of return on equity under the agreed base case financial model over the original term of the comprehensive development agreement, plus the agreed percentage markup on that amount (the amount computed under §27.10(c)(3), and an amount that will put the developer in the same post-tax position as it would have been had the payment under §27.10(c)(3) not been subject to tax). Cash and credit balances held by or on behalf of the developer shall be deducted to determine the compensation amount.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and new section as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Phillip Russell, Director, Texas Turnpike Authority Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and new section.

PUBLIC BENEFIT

Mr. Russell has also determined that for each year of the first five years the amendments and new section are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be to ensure that the department continues to receive value when it pays an unsuccessful private entity for work product contained in a response to a request for proposals and to define at the beginning of the contract term the compensation amount the department must pay to a private participant because of a termination of a comprehensive development agreement for convenience. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §27.4 and new §27.10 may be submitted to Phillip Russell, Director, Texas Turnpike Authority Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on October 8, 2007.

STATUTORY AUTHORITY

The amendments and new section are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.209, which requires the commission to adopt rules, procedures, and guidelines governing the selection and negotiation process for comprehensive development agreements and Transportation Code, §371.101, which requires the commission by rule to develop a formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project.

CROSS REFERENCE TO STATUTE

Transportation Code, §223.203 and §371.101.

§27.4. Solicited Proposals.

(a) - (e) (No change.)

(f) Requests for proposals - payment for work product. The request for proposals may [~~shall,~~ ~~as~~ ~~authorized~~ ~~under~~ ~~Transportation Code,~~ ~~§223.203(m),~~] stipulate an [~~the maximum~~] amount of money, as authorized under Transportation Code, §223.203(m), that the department will pay to an unsuccessful proposer that submits a detailed proposal that is responsive to the requirements of the request for proposals.

The commission shall approve the amount of the payment to be stipulated in the request for proposals. In determining whether to approve a payment, the commission shall consider:

(1) the effect of a payment on the department's ability to attract meaningful proposals and to generate competition;

(2) the work product expected to be included in the proposal and the anticipated value of that work product; and

(3) the costs anticipated to be incurred by a private entity in preparing a proposal.

(g) - (l) (No change.)

§27.10. Formula for Determining Compensation upon Termination for Convenience.

(a) Purpose. Transportation Code, §371.101 requires a toll project entity having rulemaking authority by rule to develop a formula for making termination payments to terminate a comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project. A formula must calculate an estimated amount of loss to the private participant as a result of the termination for convenience. The formula must be based on investments, expenditures, and the internal rate of return on equity under the agreed base case financial model as projected over the original term of the comprehensive development agreement, plus the agreed percentage markup on that amount. A formula may not include any estimate of future revenue from the project that is not included in the agreed base case financial model. This section prescribes the formula required by Transportation Code, §371.101 that shall be used in comprehensive development agreements subject to that section.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Adjusted equity IRR--The equity IRR plus a number of basis points as set forth in the comprehensive development agreement.

(2) Base case financial model--The financial model identified and agreed to by the department and the private participant under the comprehensive development agreement at or about the time the agreement is executed.

(3) Department--The Texas Department of Transportation.

(4) Equity Internal Rate of Return (Equity IRR)--A blended nominal post-tax rate of return on equity over the full term of the comprehensive development agreement equal to that projected in the base case financial model. For this purpose, equity may include unsecured capital contributions to the developer by affiliates or other equity investors in the developer, and secured project debt subordinate in priority to project debt included in the definition of senior debt termination amount.

(5) Net present value--The aggregate of the discounted values, calculated as of the valuation date, of each of the relevant projected distributions, in each case discounted using the equity IRR.

(6) Post-tax--After the payment of or provision for federal income or state margin taxes at assumed rates as described in the comprehensive development agreement.

(7) Senior debt termination amount--The amount necessary to repay the outstanding principal, accrued unpaid interest, including any interest owed through the prepayment or redemption date, and breakage costs respecting senior lien debt and first tier, unaffiliated subordinate debt secured by the developer's interest in the project, including TIFIA financing, as may be more particularly defined and described in the comprehensive development agreement.

(8) TIFIA--The Transportation Infrastructure Finance and Innovation Act of 1998, codified at 23 U.S.C. §601, et seq.

(9) Valuation date--The date established by the comprehensive development agreement as the valuation date. The valuation date may not be earlier than the date the department gives notice of termination for convenience.

(c) Compensation amount. A comprehensive development agreement under which a private participant receives the right to operate and collect revenue from a toll project shall provide that, if the department chooses to exercise its option to terminate for convenience the comprehensive development agreement and lease, the compensation to the private participant respecting the termination may not exceed the amount determined under the following formula:

(1) the senior debt termination amount; plus

(2) the amount necessary to reimburse reasonable and documented demobilization costs (if applicable) for the developer and third party contractors, as may be more particularly defined and described in the comprehensive development agreement; plus

(3) the amount computed using the formula A+B, where:

(A) A is the net present value of the distributions projected to be made under the base case financial model between the valuation date and the date the original term of the agreement expires (without taking into account the effect of the termination for convenience); and

(B) B is an incremental adjustment in the form of one or more special distributions that would be required to increase the equity IRR to a blended, nominal post-tax rate of return on equity equal to the adjusted equity IRR, calculated immediately prior to the valuation date; plus

(4) the net increase in costs the developer will incur to provide training, instruction, and assistance to the department or its designees in the use and operation of project systems and programs as part of the transition of operations resulting from the termination for convenience, as may be more particularly defined and described in the comprehensive development agreement; plus

(5) the amount that will put the developer in the same post-tax position as it would have been had the payment under paragraph (3) of this subsection not been subject to tax, as may be more particularly defined and described in the comprehensive development agreement; minus

(6) cash and credit balances held by or on behalf of the developer, as may be more particularly defined and described in the comprehensive development agreement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703890
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 7, 2007
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 60. COMPLIANCE ADMINISTRATION

SUBCHAPTER A. COMPLIANCE MONITORING

10 TAC §60.17

The Texas Department of Housing and Community Affairs withdraws the proposed amendments to §60.17 which appeared in the June 8, 2007, issue of the *Texas Register* (32 TexReg 3094).

Filed with the Office of the Secretary of State on August 28, 2007.

TRD-200703931
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: August 28, 2007
For further information, please call: (512) 475-3916

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TITLE 22. EXAMINING BOARDS

PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 461. GENERAL RULINGS

22 TAC §461.11

The Texas State Board of Examiners of Psychologists withdraws the proposed amendment to §461.11, Continuing Education, which appeared in the May 25, 2007 issue of the *Texas Register* (32 TexReg 2813).

Filed with the Office of the Secretary of State on August 27, 2007.

TRD-200703906
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: August 27, 2007
For further information, please call: (512) 305-7706

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER A. GENERAL RULES

30 TAC §101.23

Proposed amended §101.23, published in the February 23, 2007, issue of the *Texas Register* (32 TexReg 713), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703864

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 4. TEXAS MILITARY PREPAREDNESS COMMISSION

SUBCHAPTER B. DEFENSE ECONOMIC ADJUSTMENT ASSISTANCE GRANT PROGRAM

1 TAC §§4.30 - 4.40

The Office of the Governor, Texas Military Preparedness Commission (Office) adopts new Chapter 4, Subchapter B, §§4.30 - 4.40, concerning setting forth rules of the Defense Economic Adjustment Assistance Grant Program (Program). The new rules are adopted without changes to the proposal as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4115).

The new rules are adopted because Senate Bill 1956 of the 80th Legislature updated Texas Government Code, Chapter 486 to reflect the current status of the Program under the Office. The new rules will replace previous rules adopted for repeal as published in this issue the *Texas Register* under Title 10, Part 5, Office of the Governor, Economic Development and Tourism Division, §§174.1 - 174.11. The new rules are necessary to accurately reflect current law and to reflect current program practices.

Section 4.30 sets forth the background and definitions of the program.

Section 4.31 sets forth the time limit in which grant funds must be expended.

Section 4.32 sets forth the eligibility requirement for an entity to apply for funds.

Section 4.33 provides the types of acceptable source documentation.

Section 4.34 sets forth maximum and minimum grant award amounts.

Section 4.35 sets forth the documentation requirements for the application.

Section 4.36 sets forth the processing and review of applications.

Section 4.37 sets forth the availability of funds.

Section 4.38 sets forth the Awardee responsibilities.

Section 4.39 sets forth the Commission's responsibilities.

Section 4.40 sets forth the reporting responsibilities of the grant recipient.

No comments were received regarding adoption of the new rules.

The new rules are adopted under Texas Government Code §486.002(d) which authorizes the Office to adopt rules necessary for the Program and Texas Government Code, Chapter 2001, Subchapter B, which prescribes the process for rulemaking by state agencies.

Texas Government Code, Chapter 486, creating the Defense Economic Adjustment Assistance Grant Program, is affected by the adopted new rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703874
Michael Bryant
General Counsel
Office of the Governor
Effective date: September 13, 2007
Proposal publication date: July 6, 2007
For further information, please call: (512) 475-1475

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 1. GENERAL PROCEDURES

SUBCHAPTER O. HOME-DELIVERED MEAL GRANT PROGRAM

4 TAC §§1.950 - 1.962

The Texas Department of Agriculture (the department) adopts Chapter 1, Subchapter O, §§1.950 - 1.962, concerning the department's new home-delivered meal grant program, with changes to the proposal published in July 13, 2007, issue of the *Texas Register* (32 TexReg 4314). Sections 1.951, 1.954, 1.956, 1.958 and 1.961 are adopted with changes. Sections 1.950, 1.952, 1.953, 1.955, 1.957, 1.959, 1.960 and 1.962 are adopted without changes and will not be republished.

The new sections are adopted to provide requirements and procedures for the implementation of the home-delivered meal grant program created by the enactment of House Bill 407 by the 80th Legislature, Regular Session, 2007, to establish a grant program that will allow entities providing home-delivered

meals to the homebound elderly and disabled to supplement and extend their services. House Bill 407 provides that the Department shall establish a home-delivered meal grant program to benefit homebound elderly and disabled persons in the state of Texas. New §1.950 provides a statement of purpose of the program. New §1.951 provides definitions to be used in the new subchapter. New §1.952 provides how the program will be administered. New §1.953 provides county requirements. New §1.954 provides eligibility requirements for receiving a grant under the program. New §1.955 provides the process and information required for application. New §1.956 provides nutritional standards for meals served under the program. New §1.957 provides that a grantee must comply with federal, state and local laws and regulations. New §1.958 provides requirements for service of meals under the program. New §1.959 provides requirement for documentation of eligibility of persons served by the program. New §1.960 provides permissible use of grant funds. New §1.961 provides recordkeeping and records retention requirements for grantees. New §1.962 provides requirements for access to grantee records by the Department, and other authorized governmental entities.

Three comments were received on the proposal from interested parties. One commenter, Interfaith Ministries of Houston, made two observations. They first noted that because grants are made based on meals served during a preceding fiscal year, it would be difficult for organizations to plan for expansion based on anticipated receipt of grant funds as there is no guarantee of future funding to cover expansion expenses, and because of the possibility that other organizations would likewise expand services, and the county cap would effectively limit the amount of grant funds available. While the department recognizes the validity of this comment, the structure of the grant program is set out in the statute, and the department cannot, by rule, address those issues. Interfaith Ministries also questioned the meaning of the term "proportionally" as used in §1.952 of the proposed rules. This term is taken directly from statutory language, where House Bill 407 amended §12.042(j) of the Agriculture Code. To clarify, if the total amount of grants made to approved organizations, by county (where the total to all approved organizations in the county is limited by the county cap), does not exhaust the statewide funding for the program for the fiscal year, each organization that received a grant will have that grant increased by the same proportion as would be necessary to increase the total amount of grants awarded to all approved organizations up to the available statewide funding.

The second commenter was Meals on Wheels (MOW), and they made several comments. First, in regard to §1.951(3), they noted that the term "Dietitian" was spelled differently at various places in the proposed rules. This has been corrected in the rules as adopted. MOW also suggested that the term "Dietary Consultant" also include a person in private practice. The department believes the rule, as written, already includes licensed Dietitians in private practice, as any dietitian licensed by the Texas State Board of Dietitians is now included as a "Dietary Consultant", however, since it is possible that some organizations may be using the services of persons with baccalaureate degrees in food service related subjects, but are not licensed by the State Board of Dietitians, the department has added those in private practice to the definition of "Dietary Consultant" to avoid imposing hardship on those organizations.

In regard to §1.951(4), Definitions, MOW proposed changing the definition of "Disability" to "Disabled" and specifically include persons of any age to make clear that persons of any age who are disabled are eligible for home delivered meal services. In drafting the pertinent definition, the department considered input from stakeholders who serve persons with disabilities and, therefore, declines making such changes. The proposed rules, as written, are already clear that persons (of any age) are eligible for services if they are "Homebound", as defined in the rules, and either Elderly or have a Disability. Considerable time and effort was put into determining whether the rules could be most properly written using "disabled" as an adjective, or "disability" as a noun, and while the suggested change could be implemented without changing the meaning of the rules, the department believes the rules are clear and correct as proposed.

Another comment concerned §1.951(8) and §1.956, Nutritional Standards. The comment was that the term "preprepared" was vague, and that the requirement that the meals meet both 1/3 of the RDA of nutrition for an adult and conform to federal meal pattern standards was too restrictive, as some meals (e.g. - vegetarian or prescription) might not conform to both. The department recognizes that the term "preprepared" is open to interpretation in the context cited. The intent was to assure that the meal, as delivered, need no further preparation by the client, however this word has been removed from the rules as adopted. Further, the department finds merit in the argument that some meals that would be appropriate for an individual client might not meet both the 1/3 RDA and federal meal pattern requirements, therefore, §1.951(8) and §1.956 have been amended to allow meals to meet either of those standards. Conforming changes throughout the rules have also been made.

In regard to §1.951(9), MOW also felt that the term "substantially" was vague and subject to interpretation in the definition of the term "Homebound". The department disagrees, and believes the rule, as written, is more lenient than would be the case without that term. There is no requirement that to be "Homebound" an individual be totally unable to leave their home without aid, and the department recognizes that there are individuals who should qualify for services who have extraordinary difficulty, due to handicapping conditions, leaving their home for any reason, although they may be able to do so without aid or assistance from others.

In regard to §1.954, MOW was also concerned that the word "Currently" would be interpreted to mean that if an organization did not qualify at the time of the adoption of the rules, they could not qualify in the future. While the department believes that the term should and would be interpreted to mean "at the time of application for a grant", the meaning of the proposed rules would not be altered by the deletion of this term. Therefore, this suggestion will be taken and that term has been deleted from the adopted rules.

Another concern was that §1.958, which incorporated certain service requirements from Department of Aging and Disability Service rules, included inappropriate requirements (e.g. - that the meal be served between 10:30 a.m. and 1:30 p.m.). The department agrees, and consequently the service requirements have been amended to indicate that the meals would be served in conformity with of Title 40, Texas Administrative Code, §55.27, subsections (a) and (c).

Finally, MOW made several comments directed at the various recordkeeping, record retention, and audit requirements found at §1.961 and §1.962 of the rules, generally indicating that there are several small organizations that do not now have state or federal contracts and have less sophisticated recordkeeping systems and those organizations might be unduly burdened by the

requirements in the rules. The department believes that the minimal recordkeeping requirements in these rules will not be unduly burdensome to grantees receiving program funds. The department included only those minimum requirements that are required by state law and practice in grant programs, and has no authority to deviate from or make exception to those requirements. For example, in regard to the comment to delete language referring to the Texas State Library and Archives Commission's approval of the department's records retention schedule, that approval is required by state law. Also, in regard to the comment only allowing the department and not other authorized governmental agencies access to grantee records, the department is not the only entity allowed to have access to records to a recipient of state grant funds. The Office of the State Auditor must also be allowed access.

The third commenter was Hill Country Community Action Association, Inc., and while that organization made several observations concerning the program no specific rule changes were suggested. The first comments generally concerned the definition of "Fully Funded", and the department can only note, as the commenter pointed out, that the term is not defined in the statute, but the funding provided by Texas Department of Aging and Disability Services (DADS) and Area Agencies on Aging (AAA) for home delivered meals invariably requires some sort of matching contribution, so no meals would ever be 100% financed by those funds. The department sought input from drafters of the legislation and interested stakeholders, and the consensus was that in order to give meaning to the term "Fully Funded" in the statute, any meal provided under a contract with DADS or AAA would be "Fully Funded" if the contract amount for that meal was paid, regardless of the amount of the payment in relation to the cost of the meal. A second issue was raised concerning the statutory language, which provides that the funds from this program "shall not be considered by the Texas Department of Aging and Disability Services or the Area Agencies on Aging in setting unit rates." The department is aware of that statutory language, however the interpretation of that language, being as it is a directive to DADS and AAA, will be within the purview of those agencies. Finally, questions were raised about the meaning of the statutory phrase "duplication of services." To the extent that the commenter's remarks can be interpreted as questioning the department's position on the meaning of the phrase, the department believes that the phrase simply means that a client should not be provided the same services, at the same time, under two different programs.

New 1.950 - 1.962 are adopted under House Bill 407, 80th Legislature, Regular Session, 2007, enacting new §12.042 of the Texas Agriculture Code, which provides that the Department shall establish a home-delivered meal grant program to benefit homebound elderly and disabled persons in the state of Texas; and the Texas Agriculture Code §12.016, which provides the department with the authority to adopt rules for administration of its duties under the code.

§1.951. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Approved Organization--An organization that submitted an application under this subchapter that was subsequently approved by the Department.

(2) Department--The Texas Department of Agriculture.

(3) Dietary Consultant--A registered dietitian who is licensed by the Texas State Board of Examiners of Dietitians; or a person with a baccalaureate degree with major studies in food and nutrition, dietetics, or food service management, who is currently employed as a dietictian or dietary consultant in a hospital, nursing facility, or school, or in private practice.

(4) Disability--A physical, mental or developmental impairment, temporarily or permanently limiting an individual's capacity to adequately perform one or more essential activities of daily living, which include, but are not limited to, personal and health care, moving around, communicating, and housekeeping.

(5) Elderly--An individual who is 60 years of age or older.

(6) Fully Funded--A meal for which home-delivered meal organizations negotiate and sign a contract with the Department of Aging and Disability Services or an area agency on aging, and receive funds, whatever the amount may be, in accordance with applicable state and federal laws and regulations.

(7) Grantee--An organization that has received grant funds under this subchapter.

(8) Home-delivered meal--Individual sized portions of preprepared foods that, in the aggregate, meet 1/3 of the Recommended Dietary Allowance (RDA) of nutrition for an adults and the Dietary Guidelines for Americans, or shall adhere to federal meal pattern requirements.

(9) Homebound--A person who is unable to leave his or her residence without aid or assistance or whose ability to travel from his or her residence is substantially impaired.

(10) Organization--A qualifying governmental agency or nonprofit private organization that is exempt from taxation under §501(a), Internal Revenue Code of 1986, as an organization described by §501(c)(3) of that code, which is a direct provider of home-delivered meals to homebound elderly persons or persons with disabilities in this state.

(11) Program--The Home-Delivered Meal Grant Program.

(12) State Fiscal Year--The period between September 1st of any year and August 31st of the subsequent year.

§1.954. Eligibility for Grant.

An Organization is eligible to receive a grant under this subchapter if it:

(1) currently administers a home-delivered meal program and is a direct provider of home-delivered meals to Elderly persons and/or persons with a Disability;

(2) (if a nonprofit private organization) has a volunteer board of directors;

(3) practices nondiscrimination;

(4) has an accounting system or fiscal agent approved by the county where it provides meals;

(5) has a system to prevent the duplication of services to clients;

(6) has received a grant from the county in which the Organization is delivering meals, in accordance with §1.953 of this title (relating to County Grant Required);

(7) has submitted an application in accordance with §1.955 of this title (relating to Application); and

(8) agrees to use funds received under this subchapter only to supplement or extend existing home-delivered meal services.

§1.956. Nutritional Standards.

Each Home-delivered meal to which grant funds are applied shall be approved by a Dietary Consultant. Each meal must meet 1/3 of the recommended dietary allowance (RDA) for adults and the Dietary Guidelines for Americans, or shall adhere to federal meal pattern requirements. The approval must occur and be documented prior to the date the meal is served.

§1.958. Service Requirements.

Each Grantee using grant funds received under this subchapter toward the preparation or delivery of a Home-delivered meal must provide such meal in accordance with the service requirements outlined in Title 40 Texas Administrative Code, §55.27(a) and (c), or other applicable local, state or federal regulations relating to the delivery, transportation, packaging of home- delivered meals, or the handling of undelivered meals.

§1.961. Recordkeeping and Record Retention.

(a) Grantees shall maintain documentation as required by the Department to verify that individuals who receive meals paid for or delivered in part with grant funds received under this subchapter each qualify as a Homebound Elderly person or Homebound person with a Disability. Such documentation may be records already maintained by eligible organizations that receive federal or state funding, or other documentation maintained in accordance with Program guidelines as may be established by the Department.

(b) Grantees shall submit reports and documentation as required by the Department to verify that expenditures made are directly related to supplementing and extending existing home-delivered meal services to Homebound Elderly persons and Homebound persons with a Disability, including documentation of the eligibility of persons receiving Home-delivered meals.

(c) Grantee shall retain all financial records, supporting documents, statistical records, and all other records relating to any grant funds received pursuant to this subchapter and expenditures of funds in conformity with federal and state regulations and generally accepted accounting principles.

(d) Records described in this section shall be maintained for the retention period in accordance with the records retention schedule established by the Department and approved by the Texas State Library and Archive Commission.

(e) All of the records described in subsections (a) and (b) of this section shall be maintained indefinitely if audit findings or other disputes or litigation have not been resolved. Grantees with multiple locations may maintain all records at a designated central location (i.e., administrative headquarters) for purposes of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 22, 2007.

TRD-200703824
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 11, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 463-4075

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CHAPTER 10. SEED CERTIFICATION STANDARDS

SUBCHAPTER A. GENERAL REQUIREMENTS

4 TAC §10.11

The Texas Department of Agriculture (the department) and the State Seed and Plant (the Board) adopt the repeal of §10.11, concerning bulk sales, without changes to the proposal published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4164).

The repeal is adopted in order to rewrite and update this entire section. New §10.11 was adopted in a separate submission. The department is the certifying agency in the administration of the Seed and Plant Certification Act, and is charged with administering and enforcing the standards adopted by the State Seed and Plant Board.

No comments were received on the proposal.

The repeal is adopted under the Texas Agriculture Code, §62.004, which provides the State Seed and Plant Board with the authority to establish standards of genetic purity and identity as necessary for the efficient enforcement of agricultural interest and the Texas Agriculture Code §12.016, which provides the department with the authority to adopt rules for administration of the code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703829
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: September 12, 2007
Proposal publication date: July 6, 2007
For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 5. OFFICE OF THE GOVERNOR, ECONOMIC DEVELOPMENT AND TOURISM DIVISION

CHAPTER 174. DEFENSE ECONOMIC ADJUSTMENT ASSISTANCE GRANT PROGRAM

10 TAC §§174.1 - 174.11

The Office of the Governor, Texas Military Preparedness Commission (Office) adopts the repeal of Title 10, Part 5, Chapter 174, §§174.1 - 174.11, concerning setting forth rules of the Defense Economic Adjustment Assistance Grant Program (Program). The repeals are adopted without changes to the

proposal as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4168).

The repeals are adopted because Senate Bill 1956 of the 80th Legislature updated Texas Government Code, Chapter 486 to reflect the current status of the Program under the Commission. The new rules are adopted in this issue of the *Texas Register* under Title 1, Part 1, Office of the Governor, §§4.30 - 4.40. The new rules are necessary to accurately reflect current law and to reflect current program practices.

No comments have been received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Government Code §486.002(d), which authorizes the Office to adopt rules necessary for the Program and Texas Government Code, Chapter 2001, Subchapter B, which prescribes the process for rulemaking by state agencies.

Texas Government Code, Chapter 486, creating the Defense Economic Adjustment Assistance Grant Program, is affected by the adopted repeals.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703873
Michael Bryant
General Counsel, Office of the Governor
Office of the Governor, Economic Development and Tourism Division
Effective date: September 13, 2007
Proposal publication date: July 6, 2007
For further information, please call: (512) 475-1475

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

16 TAC §25.498

The Public Utility Commission of Texas (commission) adopts new §25.498, relating to Retail Electric Service Using a Customer Prepayment Device or System, with changes to the proposed text as published in the February 23, 2007, issue of the *Texas Register* (32 TexReg 698). This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). This new section is adopted under Project Number 33814.

In this rule, the commission is establishing standards for the provision of prepaid electric service. This is applicable to Retail Electric Providers (REPs') using either special devices installed at the customer's home or business to record electric consumption and make payments, or using advanced meters installed by the transmission and distribution utilities and other payment mechanisms at or near the customer's home or business. Current commission rules are based on a customer establishing credit or paying a deposit to receive electric service, having the consumption metered on a monthly basis, and allowing the customer more than two weeks after the receipt of a bill for service to pay for the service and notifying the customer at least 10 days prior to the discontinuance of service. This system has several drawbacks for customers and REPs, including the risks to retail providers in extending credit, onerous requirements for many customers to pay deposits, and a long lag between the consumption of electricity and payment.

Based on the information provided in this proceeding, the commission concludes that prepaid service will be a valuable option for REPs' and for many customers, because it can reduce REPs' credit risk, eliminate the need for deposits, permit customers to make smaller, more frequent payments, and shorten the lag between consumption and payment, providing customers better information about the costs of their consumption decisions. The rule that the commission is adopting exempts REPs that are providing prepaid service under this rule from certain customer protection rules, but the commission's objective in adopting this rule is to provide customers an option that they may find valuable and preserve customer protections that are appropriate for this service. In addition, the commission is adopting customer protections that are peculiar to this prepaid service, such as requirements regarding how payments may be made and how quickly service must be restored if a customer allows its credit balance to expire and then makes an additional payment to restore service. Prepaid service has been used in other states and countries and is being used by at least one electric cooperative in Texas, and the commission believes that this service will meet a need in the competitive retail market.

The commission received initial written comments on the proposed new rule from the Electric Reliability Council of Texas (ERCOT), CenterPoint Energy (CenterPoint), Office of Public Utility Counsel (OPUC), Reliant Energy Inc. (Reliant), REPower Energy (REPower), TXU Cities Steering Committee (Cities), TXU Energy Retail Power Company (TXU Energy), and Texas Legal Services Center (TLSC). Reply comments were filed by AARP Texas (AARP), CenterPoint, Cities, OPUC, REPower, TLSC, and Texas Ratepayers Organization to Save Energy (Texas ROSE).

Public hearings on the proposed rule were held at commission offices on April 13, 2007, at 10:00 a.m., and on April 18, 2007, at 1:00 p.m. Representatives from Community Action Committee (CAC), Community Action Committee Victoria (CAC Victoria), Combined Community Action of Giddings (CCA Giddings), OPUC, REPower, Save the Family (STF), TLSC, Texas Association of Community Organizations for Reform Now (ACORN), TXU Energy, and Texas ROSE attended the hearings and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

All comments, including any not specifically referenced herein, were fully considered by the commission.

Texas ROSE urged the commission to delay the adoption of the proposed changes to the customer protection rules until more information can be gathered on the potential impacts of prepaid service on residential consumers. However, Texas ROSE offered that if a rule is adopted, it should include several important provisions. These provisions include: (1) prohibiting critical care

and seriously ill and disabled customers from taking "self-disconnection" prepaid electric service, (2) providing clear disclosures regarding the features and limitations of the service and information about other REPs and electric plans available to the consumer, (3) providing a clear disclosure of how the service may affect the customer's ability to qualify for energy assistance programs, and (4) requiring any landlord working as a REPower agent to follow the commission rules and fully disclose product information as recommended by TLSC and Texas ROSE in filed comments.

In its public hearing comments, Texas ROSE stated that "we are not convinced that the service REPower is offering is safe for Texas residential consumers, particularly the low-income, elderly and disabled." Texas ROSE added that by allowing REPower to offer its prepaid meter service without the customer protections required of all other REPs may result in unsafe living conditions and even loss of life. Texas ROSE also commented that it believes the proposed rule may result in problems, which it views as an unreasonable risk to take for the sake of saving the consumer the cost of transaction fees that the commission already has the authority to lower, and that REPs have the ability to waive.

Commission response

The commission does not agree with Texas ROSE that research on the effects of prepaid electric services is incomplete and inconclusive. Information was presented during the public hearings that demonstrate the benefits to the customers of prepaid service using a customer prepayment device or system (CPDS). The commission disagrees with Texas ROSE's assertion that the commission could resolve transaction fees issues by simply lowering fees that the REPs charge to customers for related services. These services have a cost that can be avoided through remote connection and disconnection. The commission agrees with Texas ROSE that it should limit the circumstances under which seriously ill or critical care customers would be allowed to take prepaid service using a CPDS, and has added provisions accordingly. The commission agrees with Texas ROSE that REPs should provide a clear disclosure and information regarding the features and limitations of their prepaid services. The commission further agrees with Texas ROSE that any landlord working as an agent of a prepaid REP using a CPDS shall be required to follow all applicable commission rules, and shall fully disclose product information to tenants.

Regarding disconnection, Texas ROSE discussed the provisions to exempt REPower from the PUC disconnection rules, which Texas ROSE views as a fundamental change in the offering of firm service to Texas residential electric consumers. Texas ROSE cautioned that this step should not be taken without fully considering all the consequences for residential consumers.

Commission response

The commission believes the benefits of prepaid services using a CPDS outweigh any "consequences" as posed by Texas ROSE. The commission has added disclosure provisions, in renumbered §25.498(d), which address Texas ROSE's concerns about customer disclosures. The commission does not believe that a prepaid REP should be exempt from all disconnection rules, and has addressed those provisions accordingly.

Texas ROSE provided additional background in comments pertaining to prepaid programs in Arizona and Great Britain. Texas ROSE concluded that there is little experience world-wide with the type of technology and electric service plan being offered by REPower. While noting the information provided by REPower describing the success of Arizona's Salt River Project (SRP) prepaid program, Texas ROSE stated that it would be helpful to have information and conclusions about that program from an independent, objective source, rather than from SRP itself. Texas ROSE added that it does not view SRP as a valid comparison for the prepaid electric service using a customer premise device proposed by REPower, and urged the commission to exercise extreme caution in making special allowances for prepaid service plans at the expense of customer safety.

Texas ROSE commented on several important differences between the prepaid service package being offered by SRP and REPower. It noted that the SRP's M-Power program operates under a regulated tariff and is targeted toward low-income customers or customers with poor credit histories. The rates charged by SRP for prepaid service are similar to the charges paid by regular residential customers and are predictable. Texas ROSE stated that the rates charged by REPower are among the highest rates available, and the rate is subject to change at any time. Texas ROSE added that the SRP Program is not available to customers with medical life support equipment, whereas the rule being considered by the commission does not prohibit residential customers dependent on electricity to operate life support equipment from taking prepaid service from REPower.

STF, a nonprofit organization that said it represents the interests of low-income residents in Arizona, provided comments pertaining to its experiences with SRP's M-Power program. STF said that the M-Power program has been in place for the past 10 years, and that it has found it to be a powerful and useful resource tool, helping STF to move their families to a different economic level. STF said the M-Power program works well for many homeless and low income families. In Arizona, the summer begins in March and lasts through October. STF said that many families that are referred to the STF assistance program are unable to obtain affordable housing and cannot afford utility bills.

STF summarized that customers participating in the M-Power program have the following benefits: (1) immediate feedback concerning their electric energy usage, provided through a daily electronic log of power usage and expense, that promotes "real time" change in utility usage and allows families to see the differential costs of energy usage throughout the day and week, (2) ability to learn how to better budget for utility costs on a monthly basis, (3) ability to learn the real costs of utilities in their household without the penalty of accumulating large electricity bills in the process (particularly important for low-income families who cannot "get out from under" large electricity bills in Arizona, that affect their credit history and ability to access utilities in the future), (4) provide parents an opportunity to educate their children about energy costs and the benefits of energy conservation, and (5) provide families an opportunity and incentive to become aware of and develop life-long changes in energy usage strategies.

Regarding whether STF participants are able to understand the program to prevent disconnection, the STF representative said, "trust me, they make it work." STF added further that "their families become so empowered and comfortable with the results" from the use of the M-Power system while they receive benefits from the STF program, that when they transition out of the program they request the M-Power equipment be installed in their new residence.

Commission response

The commission acknowledges Texas ROSE's observations on the differences between the regulated market in Arizona and the competitive market in Texas, where REPower seeks to offer prepaid services. While there are differences in the markets and programs proposed to be offered, the commission believes that STF has provided compelling information that demonstrates that customers can benefit from and adapt to prepaid electric service using a CPDS.

Texas ROSE stated REPower's latest terms of service agreement states that the landlord is the customer of record for the electricity services for the apartment unit with a prepaid customer-premise device and the landlord is a REPower agent. Texas ROSE commented that it found it troubling that in the terms of service agreement, the customer gives the landlord the right to allow REPower to terminate delivery of service at any time. Texas ROSE said using the landlord as an agent of the REP is much different than the SRP M-Power program, where the customer has a direct relationship with the utility company and there is no middle-man.

OPUC also commented on the role of the landlord in the prepaid model, and offered language that would prevent the landlord from initiating interruptions.

Commission response

The commission agrees with OPUC that even if listed as the customer of record, landlords, property managers or property owners shall not be allowed to request or effectuate interruptions of their tenants taking service using a CPDS. The commission has added language to prevent such persons from effectuating interruptions.

Texas ROSE noted that studies indicate that the SRP M-Power customers are, on average, reducing their electricity usage by 12.8%. Texas ROSE added that the claimed 12.8% savings should be compared to the savings that can be realized through a traditional energy efficiency program. Texas ROSE also noted that a study has been conducted in Great Britain where approximately 30% of customers take prepaid service, indicating that 34% of customers with prepayment meters were disconnected a least once during the previous year, usually because of a lack of cash. Texas ROSE also raised concern for the safety of small children who may be left without light or heat, because electricity is not available.

Texas ROSE commented that SRP reports that customer satisfaction rates for customers using M-Power are at 84 to 90%. Texas ROSE concluded that both SRP and REPower claim savings to consumers under the prepaid meter plan, due to the absence of security deposits, late fees, and reconnection fees because the customer self-disconnects. Texas ROSE believes that if fees are an issue for residential consumers, there are other solutions to the problem of high fees than the prepaid service models in use by SRP and REPower. Texas ROSE said that customers who wish to prepay are not prohibited from doing so with traditional service while still maintaining customer protections.

Commission response

The commission believes the information provided by STF concerning participants in the SRP M-Power program demonstrates that prepaid service using a CPDS has numerous benefits to customers. Customers have ability to monitor their energy consumption in near real-time, reduce electric consumption if they choose, and pay-as-they-go for electric service. There is no evidence that the safety risks associated with prepay services using CPDS are substantially different than those using traditional electric meters, where customers may have to wait hours or days for a crew to physically restore service after an interruption. The commission disagrees with Texas ROSE that a customer satisfaction rate of 84 to 90% is not encouraging, and believes that this is a substantial satisfaction rate.

A current REPower customer from Texas provided comments describing her experiences with the company and how she has benefited from the prepaid service using a customer-premise device. The customer stated that she thoroughly enjoyed the benefits of prepaid service. She is a single mother, and liked the service, because: (1) it is hard to make the large deposits that other REPs require, (2) other REPs have additional fees, (3) it was hard to understand the meter or how it works in the traditional model, and (4) prepaid service allows her to "go right to the box, push the button, and see how much (power) I used yesterday." The customer added that prepaid service helps her to better manage electricity. The service gives her the option of controlling how much to use and how much to spend. Previously, she noted, she had to "scrape by" to pay her electric bills. Now, with the prepaid service, she said she doesn't experience those problems. She also noted that the nearest pay station was less than one mile away.

Herb Roberts with REPower provided a presentation with information regarding the differences in the market between an interruption of service and a disconnection. REPower contended that there is a real difference between interruption of service and a disconnection of service. REPower argued that with an interruption, "customers are in control." REPower added that in the prepaid model, customers can better budget their expenses, and prevent disconnections. Customers have access to real-time information, can pay-as-they-go, and can budget their electricity expenses, REPower noted.

Commission response

The commission agrees with REPower that prepaid services provide many benefits to customers, including ability to better monitor and control electricity consumption.

ACORN, representing 27,000 member families in Texas, provided comments that it opposes prepaid service using special meters with disconnection ability. ACORN believed that customers using prepaid services will most likely pay the highest electric rates, and may never be able to receive electric bill payment assistance.

ACORN acknowledged that in the prepaid model, there are benefits such as the elimination of late fees experienced in the traditional credit model. However, ACORN argued that there are other ways in which the customers using customer-premise devices may be penalized. Both ACORN and OPUC pointed out that there may be transaction fees if the prepaid service includes a prepaid card, where customers are required to pay a transaction fee each time they load money on the card to obtain continued service.

CAC commented that it was concerned that REPower would only accept cash as a valid form of payment. CAC was also concerned with additional processing fees that could be charged to customers. CAC Victoria and CCA Giddings raised similar concerns in comments. ACORN commented that with prepaid service, when the money runs out, the power goes out. ACORN, TLSC, AARP, and OPUC all expressed additional concern for critical care and seriously ill and disabled customers and recom-

mended that those customers be prohibited from taking prepaid service. ACORN added that prepaid service could potentially "rip-off" the neediest customers.

Commission response

The commission acknowledges the concerns listed by these commentors. However, the commission believes that the benefits of prepaid services outweigh the costs of such service. The commission is not adopting a rule for one specific company, but a generic rule for prepaid service using meters with special functions. Many REPs may wish to offer prepaid service using a CPDS. This includes REPs that plan to offer prepaid service using a system that interfaces with a transmission and distribution utility (TDU) advanced meters as they are deployed. The commission disagrees with ACORN that prepaid service could potentially "rip-off" the neediest customers; rather, those customers who have difficulty budgeting to pay large monthly power bills, incur onerous deposits, and frequently pay fees for disconnecting and reconnecting service will now be able to pay for power on a more frequent basis and will have a greater chance of keeping the "lights on."

Regarding contract cancellation fees, the commission has added a provision prohibiting REPs using a CPDS from charging customers cancellation fees, which could be a deterrent to customer choice.

TLSC raised additional concerns regarding prepaid services, including issues pertaining to apartment complexes. TLSC opposed electric service being tied to provisions in a lease. TLSC recommended that the rule contain safeguards for customers taking prepaid service, particularly those living in apartment complexes. Similarly, OPUC expressed concerns that apartment owners may tie the lease to the purchase of electricity with a particular REP. OPUC also stated that there is a potential for misrepresentation by the landlord regarding competitive providers, and there could be incentives to engage in anticompetitive activities. REPower responded that issues between the tenant and the landlord and the REP are "market related" and are not addressed in this rulemaking. REPower further stated that it believes there are sufficient rules to address those issues.

OPUC, Texas ROSE and TLSC argued that the rule should require a "very strong" disclosure statement to the customer by the REP. OPUC also recommended that because of the special dynamics of prepaid services, there should be no indefinite contract terms and no termination fees. OPUC also commented that any special equipment that is part of prepaid services should show compliance with American with Disabilities Act (ADA), and the REP should show compliance with ADA to the commission. OPUC emphasized that customers should be able to reach the kiosk (if used by the REP), and the input keys on the Customer Information Unit (CIU), and read the print-outs from the kiosks. OPUC also recommended that the commission consider requiring Braille to be added to the CIU and the kiosks. REPower responded that a REP can offer reasonable accommodation to its system and equipment for customers with disabilities.

Commission response

The commission agrees with parties that electric service should not be tied to a lease. One of the fundamental tenets of the competitive retail market is that customers have the right to choose their retail electric provider. For some customers, the ability to obtain service without a deposit and to pay for power in smaller than monthly increments will be important benefits, and this kind of prepaid service may be very desirable. Other customers may prefer to choose a service provider on the basis of price or the environmental qualities of the energy the REP provides. To protect this right to choose, the commission is prohibiting tying of electric service to the lease.

The commission is also addressing the ability of a landlord to terminate service of its tenant in this rulemaking. The commission agrees with parties that a disclosure statement incorporating some of the commentors' suggestions should be provided to the customer by the REP, and has added language accordingly. The commission is including in the rule requirements relating to ease of payment. This rule should result in the development of prepaid service plans by several REPs using different payment mechanisms, and customers should be able to choose a payment mechanism that meets their needs. The commission agrees that REPs must comply with all applicable federal disability laws and urges REPs to provide reasonable accommodation to customers with disabilities. The commission disagrees with REPower that there are other rules that sufficiently address the relationship between the customer and the landlord, and has addressed that issue in this rulemaking.

AARP opposed the adoption of a prepaid rule. However, if approved, AARP stressed that the interruption protections for prepaid services should be equivalent to the protections for customers taking traditional retail electric service. AARP agreed with the proposed provisions that would require REPs to offer deferred payment plans during extreme weather emergencies. AARP also suggested that REPs should offer customers deferred payment plan options if they have an inability to pay. AARP stated that the commission should not "lower the bar" for prepaid services. AARP also raised concerns regarding potential billing disputes, and how that situation may change if there are not actual paper bills issued to the customer. AARP also expressed concern regarding PUC investigations for complaints, and wondered how information would be provided in the prepaid model. AARP urged the commission to match this rule to existing rules.

Commission response

The commission believes there is a special need for deferred payment plans during extreme weather emergencies. The commission has also included a provision in renumbered §25.498(f)(3) which requires REPs to maintain usage records for two years. The commission agrees with AARP that the bar should not be lowered for prepaid services, and believes that customer protections are adequately addressed in this rulemaking. Prepaid service is fundamentally different from post-paid service, however, and the commission is not requiring REPs offering service under this rule to offer deferred payment plans to customers who express an inability to pay. One of the benefits of this service is the ability for customers to make more frequent payments in smaller amounts, and this should help them avoid accruing large obligations that would warrant a deferred payment plan.

General comments

CenterPoint encouraged the commission to view this rule as allowing for the implementation of a pilot project for prepaid systems. REPower disagreed with CenterPoint, and argued that this rule is not being undertaken as a pilot project. CenterPoint said that following the adoption of this rule, work should begin immediately to develop a more comprehensive rulemaking to address other issues related to prepaid service. CenterPoint said the commission should make it clear that adoption of this rule

does not foreclose or preempt reconsideration of issues or alternatives in a subsequent rulemaking.

TXU Energy said it supports innovative products such as the one promoted by REPower, because such products lead to more options and choices for customers. TXU Energy also said that as new products and services are designed, the commission should quickly and fairly adopt rules that are consistent with PURA, maintain a level playing field for REPs, and provide the "appropriate safeguards and protections for customers." In reply comments, TLSC and Texas ROSE agreed with such comments.

TLSC also commented that it does not support allowing customer protection rules to be changed to benefit one REP's proposed prepaid service if it causes a hardship to other REPs that do not provide similar services. TLSC urged the commission to require REPs offering a prepaid service to disclose service limitations to potential customers, make pre-payment devices and statements of account accessible to customers at any time, and allow customers better opportunities to test that consumption is being properly metered.

Cities opposed the implementation of the proposed rule. Cities expressed concern that the commission may be proposing new policies that will encourage services that have not been demonstrated to benefit consumers and that ultimately may harm consumers by relaxing customer protections relating to billing and the interruption of service. REPower disagreed with Cities' assessment, and argued that the Texas legislature in 1999 clearly envisioned a competitive marketplace that offered consumers many different and varied options for their electric service, as well as technological innovation.

Cities said it did not believe consumers will take the time to familiarize themselves with technical and complicated consumer rights and obligations that will apply under this new rule. Cities said consumers may not understand the steps they must take to avoid service interruptions or to prevail in a complaint against a REP who does not follow the rule requirements prior to interrupting service.

Cities also said it does not believe the commission has adequate staffing to enforce the requirements of the proposed rule, including new requirements of billing information, metering accuracy, deferred payment plans, and restrictions on interruption of service. Cities said that if these provisions are not enforced, there will "almost certainly be customer service related problems and numerous customer complaints." Therefore, Cities said the benefits of the proposed rule do not offset the potential costs of administering the rule and the relaxation of consumer protections. REPower disagreed with Cities and argued that the commission will actually receive fewer complaints from customers taking prepaid services using a CPDS.

Commission response

The commission wants to encourage new, innovative product offerings, including those that provide customers additional flexibility to choose how frequently to pay for electric service and flexibility to monitor electric consumption in real-time. The benefits of prepaid service using a CPDS are substantial and should not be limited to small pilot projects. The commission is therefore adopting a rule that will allow REPs to offer the services in all service areas open to competition. By adopting a rule of general applicability, the commission seeks to ensure that all REPs are subject to the same rules and have an equal opportunity to provide customers such prepaid services. The commission agrees with CenterPoint that the adoption of this rule does not foreclose or preempt reconsideration of issues or alternatives in a subsequent rulemaking.

The commission also believes that with the appropriate rules in place, customers will be able to follow the appropriate procedures, as well as take the steps necessary to avoid service interruption. The operation of the prepayment systems described by REPower is not complicated, and the information from the SRP indicates that customers do not have difficulty understanding how such a system works. Some of the drawbacks of the existing credit system include a significant lag between the time that energy is consumed and when customers must pay for it, and real-time cost and consumption information that is not available to the customer. Shortening this lag, as the testimony from STF indicates, may be a significant improvement for customers, helping them understand the real costs of their energy consumption decisions, improving their ability to control their consumption, and allowing them to pay in smaller increments. In fact, this evidence demonstrated that customers have greater control over their electric service with the prepayment model than in traditional post-payment electric models. Customers are able to monitor usage in near real-time and have greater flexibility to decide how often and how much to pay toward their electric service. The commission has adequate staff to enforce customer protection rules. A more comprehensive rulemaking could be conducted, if needed, to address any issues that arise from the adoption of this rule and address other prepaid retail electric service models.

TLSC and Texas ROSE stated that any prepayment devices installed should meet standards of the TDU and should not interfere with the TDU meter or equipment.

REPower stated that the Texas customer protection rules were written without prepayment models in mind, and the traditional post-payment model has been the primary model by which electric service has been delivered. REPower said that the prepayment model is very different than a post-payment model, and therefore the customer protection rules imposed on REPs offering prepaid electric service using customer premise devices should be different than the rules imposed on REPs providing traditional electric services. TLSC and Texas ROSE disagreed with REPower on these points and emphasized the importance of customer protection rules.

REPower stressed that the prepayment system reduces a REP's collection costs and other inefficiencies present in a traditional post-payment electric service model. REPower also said that electric service using customer premise devices is an innovation that replaces the need for traditional disconnections as a collection mechanism, because service is not provided until funds are collected and further, customers have the benefit of real-time awareness of their consumption information so they can easily control their usage as well as their total energy costs.

REPower added that under a post-payment model, customers consume electricity before they pay for it, and that customers do not receive real-time information regarding their consumption and expenses. REPower said that there are few other industries where consumers consume the product prior to purchase without any knowledge of the price or quantity they will have to purchase. REPower said most day-to-day transactions such as purchases of groceries and gasoline require customers to pay as they go, rather than be billed later for the items.

TLSC and Texas ROSE agreed in reply comments with Cities' concern that prepaid services may not have been fully demon-

strated to benefit small residential consumers, and may actually harm those customers by "relaxing selected customer protection provisions relating to billing and disconnection of service." AARP argued that the proposed rule could weaken existing customer protection rules.

Commission response

The commission agrees with REPower that the commission's current customer protection rules were not written with this kind of prepayment technology in mind. These current rules are unworkable for prepaid electric service using a CPDS, because they require issuance of bills after service has been provided and they do not clearly allow a prepaid electric service provider to interrupt electric service without undergoing a lengthy notice process. The commission agrees with TLSC and Texas ROSE that commission rules must ensure that customer protections are maintained. However, the commission believes that different customer protections are appropriate for traditional post-payment electric service and prepaid electric service models. Therefore, the commission is providing certain modifications to customer protection rules to accommodate the prepaid services using a CPDS and adopting new customer protections to make this service work well for customers.

The rule provides customer protections to ensure that customers can track their electric service usage and account balance on at least a daily basis and provides them an advance warning prior to any interruption of service. It also provides customers the ability to quickly restore service at a lower cost than reconnection fees charged under post-payment models. The commission agrees with TLSC and Texas ROSE that the CPDS should not interfere with the TDU meter or equipment. The commission disagrees with AARP that this rulemaking will weaken the existing customer protection rules and believes this rule takes adequate steps to ensure customer protection rules are maintained.

REPower said that REPs providing service under the traditional post-payment model use disconnection of service as a collections mechanism. REPower said that in Project Number 27084, the commission concluded that the right to disconnect customers for non-payment had helped affiliate REPs to "significantly reduce their bad debt levels." REPower also noted that the commission in Project Number 27084 stated that "one of the goals of competition is for the industry to offer better prices and innovative services for customers. Uncollectible revenues incurred by REPs will ultimately be borne by other customers, as retail prices are adjusted upward to recover these costs. Such rate impact is to the detriment of all customers and the development of the competitive market. Extending the ability to request disconnection by all REPs should therefore enable non-affiliated REPs to compete more vigorously on price."

REPower commented that it believes that customers that fail to maintain a sufficient credit balance in to the prepay model will fully understand that their service will not continue until a credit balance is restored. REPower said that service interruptions in the prepay model, unlike disconnections, are fully within the control of the customer. Interruptions, according to REPower, do not require the processing of Texas SET transactions nor the actions of the TDU to effectuate, as do traditional disconnections.

Commission response

The commission acknowledges that like a "disconnection" at the point of delivery, an "interruption" of service on the customer side of the point of delivery can facilitate a REP's management of revenue collection. Reducing or avoiding uncollectible debt would allow REPs to eliminate or reduce customer deposits compared to post-payment models, and may allow REPs to offer services at a lower price. One of the commission's objectives in this rulemaking is to facilitate competition among REPs in providing prepaid service, so that competition can put downward pressure on the retail prices offered by REPs for prepaid service. Furthermore, by avoiding disconnections and reconnections, the REPs and customers may avoid costs and delays associated with transaction processing and sending out crews to provide those services. However, the immediate impact on customers of an "interruption" is similar to the impact of a "disconnection" - the customer is left without power.

REPower said the commission's disconnection and billing rules should not apply to prepaid electric service, and requested changes to the rule that would allow a REP using a prepaid CPDS to interrupt service to a customer whenever that customer's prepaid balance is exhausted. REPower's equipment is not capable of obtaining instant remote signals that could be sent to prevent interruptions of electric service on extreme weather emergency days. REPower argued that prohibitions against interruption of service for ill and disabled customers and during extreme weather are only appropriate for customers receiving service using post-payment models and not prepayment models. TLSC and Texas ROSE opposed changing the rule to allow for interruption of power on extreme weather emergency days just because one company's equipment does not have instant remote communications capabilities. They argued that the standards for commission rules should be based on the needs of the customer rather than the technical constraints of one company's equipment.

Unlike traditional electric service, where a customer is often required to pay a deposit and is billed for electric service after receiving it (post-payment model), many REPs offering prepayment electric services do not charge a deposit and therefore have no assurance they will be paid by a customer if they provide service after the customer's account balance has been exhausted. Because of this difference, REPower said prohibition on interruptions of power for ill and disabled customers or customers during extreme weather emergencies "have no place in this rule."

TLSC and Texas ROSE responded that a customer's real-time awareness of energy consumption or a low prepayment balance would not protect a critical care or disabled customer from losing power during an extreme weather emergency and possibly losing his or her life. TLSC and Texas ROSE argued that rules that temporarily prohibit disconnection of ill or disabled customers or disconnection on extreme weather emergency days were written with the "intent of protecting the most vulnerable persons in society." Further, TLSC and Texas ROSE said those protections are needed regardless of the type of meter or equipment installed at a residence.

TLSC and Texas ROSE argued that TDUs directly notify REPs, not customers of extreme weather emergencies, putting REPs (and not customers) in the best position to determine when the prohibition against disconnection due to a weather emergency applies. TLSC and Texas ROSE argued that the commission lacks the authority to adopt a rule that supersedes requirements created by statute, specifically PURA §39.101 and §39.107. They stated that regardless of the type of model being employed by a REP, the statutory requirements cannot be avoided by merely changing the commission's customer protection rules.

Commission response

The commission believes the rulemaking should strike a balance between the needs of customers for safeguards ensuring they receive continuous and reliable electric service and the needs of REPs to collect from customers amounts owed for the service, and be able to offer innovative products and services. The commission agrees with TLSC and Texas ROSE that the rule should not be dictated entirely by technological constraints of equipment that one REP has used or plans to install. REPs have the obligation to operate within the commission rules that are designed to afford certain protections to customers.

While the commission notes the distinction that REPower makes between interruption and disconnection, the commission agrees with TLSC and Texas ROSE that the two words have the same meaning for the customer. Whether electric service to a customer is disconnected at the TDU meter (point of delivery) or interrupted on the customer side of the meter (by a CPDS), the customer is immediately left without power. Because REPs offering prepaid service using a CPDS will be precluded from having a deposit to cover service (except for an equipment deposit) provided to customers after a customer's prepayment balance is exhausted, it reasonable to allow REPs using a CPDS to interrupt service in most cases when a customer's prepayment balance is exhausted, provided that certain disclosures have been made to the customer and other safeguards are in place. However, it is reasonable to place in the rule safeguards that prohibit a REP from interrupting service during extreme weather emergencies, weekends, and for seriously ill or critical care customers.

The commission agrees with Texas ROSE and TLSC that any modifications to existing customer protection rules cannot contradict Texas statutes, and has provided in the rule a prohibition against interruption of service during weekends, extreme weather emergencies or for seriously ill and critical care customers. PURA §39.101(a)(1) and (h) require the commission to establish retail customer protections against service disconnections during an extreme weather emergency. The commission agrees with TLSC and Texas ROSE that customers need protection from interruption of electric service during extreme weather emergencies, whether the interruption occurs at the TDU meter (point of delivery) or on the customer side through an interruption of power by the CPDS. Likewise, the commission finds that seriously ill and critical care customers are particularly vulnerable to the negative effects of disconnections and interruptions of power. Therefore, the commission adopts renumbered §25.498(j), which prohibits REPs from providing prepayment service using a CPDS to a critical care customer or a customer that is seriously ill or has a person residing with them who is seriously ill, if the customer does not sign a waiver, provided by the REP, which states the customer understands the medical risks associated with the fact that its retail electric service can be interrupted. The rule requires that if such a customer chooses not to sign such a waiver, the REP shall work with the customer to transition the customer to another product or provider in a manner that avoids a service disruption. The commission disagrees with REPower's contention that disconnection protections are only appropriate for traditional credit models.

The commission in this proceeding considered what type of billing information or statements a customer receiving prepayment services using a CPDS should receive. REPower stated that it believes that customers would find expenditure information more useful that simply presenting consumption information. TLSC and Texas ROSE argued that REPower's contention ignored the fact that customers who need weatherization or energy assistance through the Low Income Home Energy Assistance Program (LIHEAP) need more than expenditure information to be eligible for assistance. They said energy assistance agencies may require customers to present billing history as part of an application process. TLSC and Texas ROSE argued that to comply with P.U.C. Substantive Rule §25.472(b)(4), REPs providing prepayment services must provide customers with everything that would exist on a traditional bill, not just expenditure information, so that these customers have access to energy assistance for which they may be eligible.

REPower argued that service interruptions are not disconnections. REPower explained that the term "disconnection" has specific meaning in this market, and the rules and protocols that govern this market, underscore this specific meaning. According to REPower, disconnection is a "term of art" that refers to the market process by which a REP requests that a TDU physically sever the electric service to a premise. Under existing commission rules and protocols, a "disconnection" is an action taken by the TDU at the request of the REP, where the customer has no direct control.

TLSC and Texas ROSE were also critical of provisions in the rule that allow REPs to deliver payment and usage data to customers electronically, rather than on a printed bill or statement. They said allowing REPs to deliver such information through some electronic means ignores the fact that many customers will not have a computer and internet access, and many may be unable to use such devices if their power has been turned off. TLSC and Texas ROSE argued that people who need energy assistance may be among the least likely to have computers or internet access, and therefore customers using prepayment services should be provided summaries of electric usage by mail or hand delivery, rather than electronic delivery. Texas ROSE further explained that TDUs notify REPs and not customers of extreme weather emergencies. Therefore, they argued that it is critical that REPs and not customers bear the responsibility to prevent interruptions of power during extreme weather emergencies. They argued that customer premise devices that are not capable of remote communications should not be permitted.

CenterPoint commented that it does not take a position on how those terms should be defined for purposes of this rule, but disagreed that there is a distinction between interruption and disconnection as those terms are used in this market. CenterPoint added that those terms are used in the TDU Tariff for Retail Delivery Service (Tariff), as is the term "suspension" of service, but they are not specifically defined and the distinction between them or the extent that they are fungible is unclear. CenterPoint argued that this rulemaking is not the appropriate vehicle for resolving Tariff interpretation issues, or adopting terms or making distinctions that would apply to the Tariff. CenterPoint requested that this rule make clear that if any definition or distinction between interruption and disconnection is adopted in this rule, that it is limited in its application solely to this rule.

Commission response

The commission is adopting renumbered §25.498(f)(1), which will require a REP to provide a statement of electric usage to a customer upon request. The LIHEAP program allows customers requesting energy assistance to fill out a release of information form that LIHEAP agencies use to obtain electric usage data directly from REPs. Subsection (f)(4) of the rule requires a REP to provide such summary data within one business day. Therefore, customers have avenues to receive electric usage and pay-

ment history in a timely manner. Furthermore, the rule's disclosure provision, renumbered §25.498(d), requires customers taking service under this rule to be provided a prominent disclosure informing them that service can be interrupted when their prepayment balance is exhausted and of any limitations on access to energy assistance. Section 25.498(f)(4) also requires a REP to provide a summary to an energy assistance provider within one business day. CenterPoint's request regarding the tariff (§25.214) is not addressed.

§25.498(a)

Reliant supported §25.498(a) as drafted, and urged the commission to retain this language in the adopted rule.

TXU Energy suggested that two additional exceptions be added to this subsection. First, §25.473(d)(2) requires a REP to provide "customer bills" in both English and Spanish. Renumbered §25.498(c)(7) states that communication from the customer premise device shall be in English "or" Spanish. TXU Energy agreed that the REP should have the option, and suggested that the customer billing portion of §25.473(d)(2) be exempted in this section. In reply comments, OPUC commented that the customer should be able to choose what language the information is communicated.

TXU Energy also recommended adding §25.479(c)(1) to the list of rules that REPs using a CPDS will be exempt from following. Section 25.479(c)(1) lists requirements for what must be printed on a customer bill, and since renumbered §25.498(f)(1) states that a REP is not required to issue traditional bills to customers, TXU Energy said §25.479(c)(1) should be added to clarify that the list of what must be printed on a bill also does not apply to prepaid REPs.

Commission response

The proposed rule included an exception for all of §25.479(b), so there is no need to specifically address subsection (b)(1) of that section. The commission agrees with TXU Energy with respect to renumbered §25.479(c)(1), and has made changes accordingly. For clarification purposes, the commission has added to this list of rules, P.U.C. Substantive Rule §25.454(e)(3)(C), which specifies a line item that is required to be placed on the bills of LITE-UP customers. In lieu of this requirement, the commission has amended subsection (c) to require that the REP include a statement that the customer is receiving the LITE-UP Discount on the written receipt or confirmation of payment, and leaves the exact wording to the discretion of the REP. The commission agrees with OPUC that a CPDS as well as other communications to the customer should be capable of communicating in English and Spanish.

§25.498(a)(2)

REPower continued to emphasize that an interruption of service to a customer being served under this rule is not a disconnection of service. REPower stated that it believes that all REPs, including those offering prepayment services, are governed by §25.483, which establishes the standards for disconnection of service. REPower requested that the rule clearly state that "interruptions in service" are not "disconnects."

TXU Energy commented that it was unclear as to why all of §25.483 was given as an exception. TXU Energy also commented that §25.483(b)(2)(A) and (B) require a REP to test all electronic transactions related to disconnections and reconnections of service, and to file an affidavit from an officer of the company affirming that the REP understands PUC rules and has trained its staff on disconnection and reconnection requirements. TXU Energy argued that all REPs should comply with these rules, including REPs using a CPDS . TXU Energy stated further that §25.483(d) allows a REP to disconnect for reasons such as dangerous conditions, or service connected without authority, and these should remain. TXU Energy also pointed out that §25.483(e) covers situations where a REP cannot disconnect service, that should apply to a CPDS as well.

Commission response

The commission disagrees with the contention that an interruption of service is not a form of a disconnection. An interruption of service is a form of a disconnection. The commission agrees with TXU Energy that a minimum requirement for the power to be turned on immediately is beneficial to the market and has made modifications accordingly. The commission agrees with TXU Energy's comments concerning §25.483(b)(2)(A) and (B), (d) and (e) and has modified the rule accordingly.

TXU Energy commented that turning on the power after payment is received is one of the assumed benefits of prepayment services, as well as the ability to turn the power off at the moment the prepaid account is exhausted. TXU Energy stated that it believes that the power should come back on when the prepaid account has a positive balance of at least $50, or within some reasonable amount of time. TXU Energy proposed that power be restored within 24 hours after the customer accrues a positive balance of $50. OPUC disagreed with TXU Energy that a customer should have to pay $50 to restore service.

Commission response

The commission agrees that power should be restored soon after payment is made, and has modified language to require REPs beginning on June 1, 2008, to restore power to customers using a CPDS within two hours of receipt of a customer's payment. Prior to June 1, 2008, REPs will be required to restore electric service using a CPDS under the same timelines as reconnections must be processed pursuant to §25.483(m). The commission realizes that some prepay REPs may install a separate meter on the customer premises, while others will choose to use TDU advanced meters, or other technologies. The commission is phasing in the two hour electric service restoration requirement to allow REPs time to replace or modify equipment so the REPs can meet the two hour service restoration requirement. The commission disagrees with TXU Energy and agrees with OPUC that $50 minimum to restore service is an unnecessary amount. The commission has revised the rule to prohibit a REP from requiring customers using a CPDS to make a minimum prepayment transaction amount. One of the benefits of prepaid service is that it allows customers to pay for service in small increments. Establishing a $50 minimum would undermine this benefit. The prohibition on a minimum transaction amount is not intended to prohibit a REP from charging a reasonable transaction fee to a customer making a payment using a CPDS, provided that the fee has been disclosed in the REP's terms of service document.

§25.498(a)(3)

REPower proposed a new section be added to address the distinction between voluntary interruptions of power that occur when a customer's prepaid balance is exhausted, and disconnections, which occur when a TDU stops power flow at the point of delivery. REPower suggested this distinction be communicated to the customer at the time of enrollment. REPower argued further that customers should be fully aware

that interruptions of power are not the same as disconnections, and as a result, the protections customers might expect to receive from a post-payment REP may not be provided by a prepayment REP.

Commission response

The commission agrees with REPower that more direct notice of the consequences of failure to prepay for service is appropriate and has modified the disclosure statement required by §25.498(d) to address this matter more directly.

§25.498(b)(1)

With the addition of subsection (b), relating to definitions, provisions in proposed subsection (b) appear in subsection (c) of the rule that the commission is adopting. Reliant recommended that throughout the rule, the phrase "prepaid" services or "power" be replaced with the phrase "retail electric" service or "electricity."

TXU Energy questioned the need for REPs to file with the commission a written description of its prepaid services using a customer-premise prepayment device, prior to offering such services to customers. Rather, TXU Energy suggested that REPs inform commission staff. TXU Energy stated further that there is a concern that competitors could review the filings to obtain sensitive competitive information about a company's future products and business plans, which could cause a company to lose its competitive advantage. At a minimum, TXU Energy said, anything provided to the commission should be provided under seal by the REP.

REPower commented that it is not appropriate to require a REP to file a written description of its prepaid service. REPower argued that its unnecessary to require REPs to file specific information in advance of a product offering describing how compliance will be achieved. OPUC argued that parties should have access to the description of the prepaid services prior to the offering, so that potential problems can be addressed before they occur. OPUC further suggested that if the commission determines that a filing is not required or may be made under seal, the REP should be required to provide the same information to OPUC that it provides to the commission.

Commission response

The commission agrees with TXU Energy that a REP should not have to file a written description of its plan for prepaid services, but rather, a REP shall file a general statement of intent to provide services using a CPDS. The statement will not need to be approved by the commission, and the exact details of the products need not be provided to the commission. The commission agrees with OPUC that the REP shall file a copy of the statement of intent with OPUC. In order for the commission to assist customers who call with questions or complaints, it must know which companies are providing prepaid service under this rule. The commission will maintain a list of companies who have filed a statement of intent to provide service. The filings will provide notice to the public and staff of the services being offered and permit the staff to obtain any additional information it needs to assist customers.

TLSC contended that the rule should not and cannot use disclosure statements to operate as a way for a REP to evade customer protection rules. TLSC and Texas ROSE recommended specific language to be used in a model disclosure page, and argued that it met the requirements of subsection (c) of the rule.

Commission response

The commission agrees with TLSC and Texas ROSE that REPs shall be required to provide customers a separate disclosure statement along with the Terms of Service when a REP enrolls a new customer, and has added language to that effect to the rule.

§25.498(b)(2)

CenterPoint proposed that a defined term, "Customer Prepayment Devices or Systems (CPDS)," be used throughout the rule. Alternatively, "Prepayment Systems" could be used. CenterPoint also suggested that the language in this section be modified to include the term "systems," so that REPs that use equipment different than that proposed by REPower may participate under the rule. For example, the rule should allow for technologies and services that would be available through communication with a TDU's AMS, if available. In reply comments, REPower supported the language suggested by CenterPoint.

CenterPoint also suggested the removal of the word "premise," as part of the defined terms for prepayment devices. CenterPoint added that while REPower equipment will be installed at the customer's premises, that is not true for other technologies that would support prepaid service. Therefore, CenterPoint opined, the term is unnecessarily limiting and should not be incorporated into the definition. In reply comments, OPUC opposed the removal of the term "premise", as it is key to this "fast-tracked proposed rule" due the limitations and special circumstances surrounding this type of equipment, and that it also would eliminate the distinction between prepaid electric service using customer premise prepayment devices, and other forms of prepaid service.

OPUC added that exemptions or amendments, if any are needed for other prepaid models, can be addressed in the more thorough and broad-based consideration of rules that staff contemplated would be initiated following the conclusion of this rulemaking.

In its initial comments, Reliant stated that the language should be amended to clarify that service interruption may be executed at the meter by the TDU, at the request of the REP. The current language could be interpreted to require that the prepayment device itself must initiate the interruption of electric service if the customer's prepayment balance is exhausted. REPower argued that this requirement can be streamlined to focus only on ownership of the meter and/or other software or equipment that comprises the Prepayment Management System (PMS), as defined by REPower.

Commission response

The commission agrees with Reliant and CenterPoint that a standard terminology should be used throughout the rule, and that it should be broad enough to allow REPs to provide services through a variety of customer prepayment devices, including a system that communicates with a REP using a TDU Advanced Metering System (AMS). The commission does not agree with OPUC that the removal of "premise" eliminates the distinction between product offerings and does not agree that the scope of the rule should be limited, as OPUC suggests. One of the objectives of the broader scope is to facilitate competition among REPs that provide prepaid electric service, and the commission believes that different forms of prepaid services are adequately addressed in the rule.

REPower said that the section would be strengthened if the rule listed specific technical requirements for REP-owned or controlled meters. REPower suggested that this would prevent confusion or disputes related to the deployment of such meters

and would clarify that the technical requirements of such meters are not the same as the requirements for TDU meters. REPower said the installation of REP-owned or controlled meters should be governed by many of the same provisions that apply to TDU meters, specifically, §25.121(e), as well as §25.122 and §25.125.

REPower also proposed that a definitions section be added to the rule, to include the terms "Prepay Metering System" and "Interruption." REPower suggested that PMS be defined as a system that includes a meter and other software or equipment that has the capability of providing the prepay services outlined by the rule. REPower further suggested that "interruption" be defined as the automatic cessation of electric service by a PMS to a premise that occurs when the customer fails to maintain a credit balance during a time period in which interruptions are not prohibited under this rule.

Commission response

The commission agrees with REPower that certain standards concerning prepayment devices that meter electric consumption should be specified by the rule and that a definitions subsection is appropriate, and has modified the rule to address these concerns. The commission is not adopting the suggested definition of interruption, for reasons that are discussed above.

§25.498(b)(3)

REPower suggested that if a definition of PMS is added, the first sentence of this paragraph is no longer needed, as well as the last sentence. REPower believes that all equipment that comprises the PMS should be subject to this provision, except for upgrades to existing meters, and other PMS equipment currently being used by a REP.

Commission response

The commission agrees with REPower that all equipment that comprises the prepaid system should be subject to this provision, except for TDU meter upgrades. The commission does not agree with REPower that the first and last sentences are no longer needed. The commission believes that it is important to establish standards for the metering devices, in view of the latitude that the rule gives to REPs to select and install such devices as a part of a CPDS.

§25.498(b)(4)

CenterPoint proposed a new section to govern the installation and operation of REP owned or controlled prepayment devices or communication equipment. The proposed language gives notice to a REP that its equipment must be installed in accordance with TDU standards, and that it cannot interfere with the operation of TDU equipment, including communication equipment. CenterPoint said that as technology advances, it is critical to ensure that REP devices function in conjunction with TDU equipment, without creating interference.

REPower argued that each TDU appears to interpret existing tariff provisions differently. REPower suggested that TDU issues will require more attention and thought and should be addressed in the more comprehensive rulemaking already anticipated. For this reason, REPower opposed the suggested language by CenterPoint.

Commission response

The commission disagrees with REPower that this new section should not be added, and agrees with CenterPoint that a new section is appropriate that addresses the installation and operation of REP owned or controlled prepayment devices or communication equipment, and has added language accordingly. The commission has also added language to the rule that allows a TDU to install a CPDS, and it shall not constitute a provision of a competitive energy service as those terms are defined in §25.341(3).

§25.498(b)(5)

CenterPoint and Reliant recommended that this section be rephrased to not preclude payment by methods other than those listed. CenterPoint proposed the phrase "including but not limited to," to accomplish adding flexibility. Reliant suggested clarifying this section to assure that REPs and customers have the freedom to choose mutually acceptable methods of payment. Reliant believes the rule was intended to allow a system where the customer can make a payment via telephone or Internet, obtain a confirmation code, and enter the code into an in-home prepayment device.

OPUC commented that this provision should be amended to include a more specific definition of "near the customer's premises." OPUC stated that it believes that a reasonable definition of "near" would be not more than one-half mile, the equivalent of five city blocks. TXU Energy recommended that "near" should at least be within five miles of the customer's premise. TLSC stated that the location should be not more than two blocks from the customer's premises.

TXU Energy stated that is was unclear what "near the customer's premises" meant. TLSC commented that the term "near" was too ambiguous and thus not adequate protection for customers. TXU Energy recommended that the rule be changed to require a REP to provide one device option on the premises, such as in the apartment managers office, and another device nearby, such as at a local grocery store.

TLSC emphasized that REPs offering prepaid services using customer-premise prepayment devices must make those prepayment devices convenient for customers to ensure that they can access the devices at any time to allow customers to make payments to keep their service from being interrupted.

REPower agreed that customers should be able to make prepayments at locations convenient to the customer's premises, but opined that having two prepayment devices or mechanism in close proximity to the customers' promise is unnecessarily burdensome.

Commission response

The commission agrees with CenterPoint and Reliant that the rule should not preclude payment by methods other than those listed, and has made changes in accordance with this recommendation. The commission disagrees that the term "near" is not definite enough. The commission disagrees with OPUC's recommendation that "near" should include a reference to five city blocks, because city blocks are of various lengths and imposing a "one-mile" criteria is a specific measurement that can be verified. The commission disagrees with TXU Energy's recommendation that "near" should be replaced with language stating "within five miles," because that distance is not within easy walking distance and could make it difficult for some customers to make payments. The commission believes that the payment locations outside of the customer's premises shall be determined by the market. Furthermore, the commission disagrees with TXU Energy's recommendation that the rule be changed to require

payment locations both at the customer's premises and another nearby location, because requiring multiple locations may be unnecessary and would add to the cost of providing the services.

§25.498(b)(6)

TLSC stated that because customer-premise prepayment devices are exempted from complying with §25.479, relating to issuance and format of bills, customers using such service must have access at any time to a written statement of their remaining dollar balance and estimate of time or days of paid electricity remaining to apply for bill payment assistance without any time constraints associated with requesting a statement from the REP.

Commission response

The commission agrees that such notification is important and concludes that if the CPDS provides such a notification at the customer's request, the REP should provide the information to the customer within two hours from when the customer makes such a request.

§25.498 (b)(6)(B)

REPower expressed concern that not all prepay metering systems can display "electricity usage since the last payment" as outlined in the proposed rule. Some systems only allow for the real-time presentation of consumption. REPower argued that it is up to the customer to keep a record of consumption over any particular period of time. REPower offered that expenditure information, coupled with the current electricity rate provides customers with sufficient information on their usage.

Commission response

The commission agrees with REPower and has removed the requirement to show electricity usage since the last payment. A REP is encouraged but not required to provide this information to the customer. For a customer seeking to track longer-term usage and payment history, subsection (f) of the rule requires a REP to provide a customer with Payment and Usage summary upon request.

§25.498(b)(6)(D)

REPower suggested that the requirement that the customer be warned of the expiration of a credit balance be modified to allow for the warning to be based on a trigger determined by the REP and such trigger be clearly disclosed in the REP's terms of service document. OPUC disagreed with REPower and recommended that the trigger level be determined in this rulemaking. OPUC added that if a "days remaining" trigger cannot be utilized, then an equivalent level of "dollars remaining" trigger should be determined and required.

Commission response

The commission agrees with REPower and has made changes in accordance with this recommendation. The commission does not agree with OPUC's recommendations because it believes that customers will be more interested in knowing when they will need to make an additional payment for service and that different REPs will offer varying prepaid products with different triggers, and that customers should have the choice to determine what trigger will best suit their particular needs. As REPs and customers become more experienced with using these systems, they should have the latitude to adjust the triggers, within the limits established by this section.

§25.498(b)(6)(E)

REPower commented that some PMS allow for the display of expenditure information over a period of time, but not necessarily consumption information. REPower therefore proposed that this provision allow for the presentation of either expenditure or consumption information.

Commission response The commission agrees with REPower and has made changes accordingly.

§25.498(b)(6)(F)

REPower commented that this list should be expanded to include the presentation of the ESI ID, instead as an account number, as an option.

Commission response

The commission agrees with REPower and has made changes accordingly.

§25.498(b)(6)(G)

TXU Energy suggested that this language be more precise. Rather than state that the customer-premise prepayment device shall be "removed easily," TXU Energy recommended clarifying that the device be capable of being removed within 24 hours of request to the REP. REPower agreed with TXU Energy that the language should be more precise. REPower suggested that rather than removal within 24 hours, that removal begin prior to the start of business on the effective date stated on the enrollment transaction for customers that switch to a different REP.

Commission response

The commission agrees with TXU Energy and REPower that the language should be more precise. The commission agrees with REPower's suggested language and has adopted language accordingly.

§25.498(b)(6)(H)

REPower argued that a key requirement of a prepaid service is that it have the ability to automatically interrupt service when a customer's credit balance is exhausted, and suggested language to capture that requirement.

OPUC argued that a section should be added to require that the customer premise prepayment device or system provide an estimate of the hours or days of paid electricity remaining, as well as a dollar balance.

Commission response

The commission agrees with REPower that, with the exceptions noted above regarding extreme weather emergencies and seriously ill and critical care customers, a REP should be able to interrupt a customer's service when the balance is exhausted. The commission does not agree with OPUC that estimated remaining days or hours should be required because some systems may not be able to provide that information, and subsection (c)(8)(D) of the rule requires that customers receive balance information on request or daily and will receive a warning before service is interrupted.

§25.498(b)(6)(H)

OPUC and TLSC recommended that this section be amended so that a customer could request an accuracy check free of charge every two years, instead of every four. REPower pointed out that TDU's are currently required to provide a free meter test once every four years, and that prepaid REPs should not be held to a

higher standard than TDUs. OPUC also stated that the customer records should be maintained by the REP for at least four years.

Commission response

The commission concludes that the testing standards should be consistent with the provisions that apply in the case of TDU meters and has modified the section to refer to the provision of the electric delivery tariff relating to the customer's ability to request a meter test. Existing rules require REPs to retain billing records for two years, and the commission concludes that there is no reason to impose a longer retention period on prepay REPs.

§25.498(c)

TLSC commented that a REP that offers prepaid services should prominently disclose all limitations of its service compared to what a customer using a standard service would be entitled to under current customer protection rules. TLSC offered language to that effect. REPower did not agree with TLSC's suggested language for disclosure.

Commission response

The commission concludes that it is appropriate for a REP offering service under this section to disclose the terms of the service that the customer will be subject to and has adopted special disclosure requirements to provide a prominent notice that service may be interrupted if the customer fails to maintain a positive credit balance and of other key features of this service. The commission does not agree that a comparison to a service that the customer is not taking would be beneficial to a customer.

§25.498(d)

CenterPoint recommended including language requiring a REP offering service under the rule to provide the TDU contact information for the end-use retail customer, regardless of how the term "customer" is defined for purposes of ERCOT transactions. CenterPoint pointed out that under the standard TDU Tariff for electric delivery service (Section 4.3.7), all REPs, including Option 1 REPs, are required to provide this information to the TDU and keep the information current by providing updates to the TDU. CenterPoint said that the TDU will receive outage calls and other inquiries from customers who take service from REPs operating under this rule, just as the REP does with other customers. CenterPoint said this requires that a TDU has contact information for the customer, and that the rule should specifically address how it affects TDU Tariffs.

REPower commented that it fully supports the use of existing ERCOT market transactions to provide market participants with information necessary to process customer transactions. REPower suggested modifying the language to reflect that existing Texas SET transactions be referenced. Further, REPower suggested that the last sentence clarify that all REPs are required to provide ERCOT customer billing contact information in the format required by ERCOT.

ERCOT commented that it does not take a position on whether the name, service, mailing addresses and ESI ID of each customer taking service under this rule needs to be provided to the TDUs. However, ERCOT stated that for its purposes, it does not need to know the names of customers taking service under this rule. ERCOT stated further that neither the postcard-notification system for retail switches nor the customer information repository that is being assembled for mass-transition contingencies would be affected by the existence of a prepaid meter or device. ERCOT therefore requested that references to ERCOT be stricken from this section.

Commission response

The commission agrees with CenterPoint that the rule should refer to the standard TDU tariff for electric delivery service and require that customer names be provided to the TDUs. The commission also agrees that the REP should provide customer information to the TDU. The commission agrees with parties that REPs shall follow ERCOT protocols and provide only the information ERCOT requires and has made changes accordingly.

§25.498(e)(1)

REPower stated that it does not believe that a REP should be required to deliver a document of a customer's usage history by mail or hand delivery, if the customer agrees in writing to electronic delivery. REPower also stated that it believes that it should only be required to provide such a summary free of charge once per year.

Commission response

Subsection (e) as proposed is being adopted as subsection (f). The commission does not agree with REPower. A customer should be able to obtain their billing and usage history, anytime, free of charge from the REP, so that they may track their usage and check the accuracy of charges. Because REPs providing service under this rule are being exempted from the obligation and expense of producing monthly bills to customers, it is reasonable that they provide customers a payment and usage summary free of charge upon request. The commission agrees that the information can be provided by an electronic means that provides a customer a durable record, such as an email, if the customer agrees.

§25.498(e)(2)

REPower suggested that the summary of electric charges in the prepay model should not include the same information required in a bill to customers taking traditional service under a post-payment model. REPower therefore suggested amending this subsection to state that it requires the provision of a purchase and usage history for a time period requested by the customer.

Commission response

The commission does not agree with REPower. Because REPs providing service under this rule are being exempted from the obligation and expense of producing monthly bills to customers, it is reasonable that they provide customers a payment and usage summary upon request that includes most items that would be included in a bill for customers taking traditional service under a post-payment model. This information is necessary for customers to track their usage and check the accuracy of charges.

§25.498(e)(3)

Reliant recommended a slight modification to this subsection, for the purpose of consistency with §25.479(g), relating to Issuance and Format of Bills, and suggested a clarification that the summary is required for the most recent 24 months, rather than any two year period. REPower agreed with Reliant.

Commission response

The commission agrees with Reliant and REPower and has made changes in accordance with their recommendations.

§25.498(e)(4)

Renumbered §25.498(f)(4) would require a REP to provide information to an energy assistance agency. Reliant recommended a modification to this subsection, for the purpose of consistency with §25.472(b)(4), relating to Privacy of Customer Information. Reliant recommended that the REP be required to provide this information for the duration of the customer's service with the REP, for up to one year.

REPower objected to the requirement that a REP require proof of an energy assistance provider's authority to request a customer's payment and usage history. REPower suggested this requirement be amended to delete the phrase concerning proof of authorization. REPower also suggested modifying the requirement so that 12 month histories are provided, if available.

Commission response

The commission does not agree with REPower that a REP shall not have to seek proof of an energy assistance provider's authority. Customers have a right to privacy of consumption information under PURA. The commission also disagrees that the 12-month histories requirement be modified. The commission agrees with Reliant's recommendation and has made changes accordingly.

§25.498 (f)(1)

Subsection (f) in the proposed rule is now subsection (g) and deals with deferred payment plans. REPower re-emphasized that the rules governing a prepayment model should be fundamentally different from the post-payment model. REPower believes that customers understand that with prepayment service, they have to pay in advance to keep the lights on. REPower agreed that a REP should be required to provide a deferred payment plan if a customer is underbilled. However, it said such a plan should be limited to a specific dollar threshold so that it would not unnecessarily be required to provide such plans for minor balances. REPower suggested a deficit balance of $75 to trigger the right to a deferred payment plan. REPower stated that it proposed the $75 trigger to level the playing field between post-payment and prepayment REPs with respect to the obligation to provide deferred payment plans. OPUC disagreed with REPower, stating that REPower had not provided adequate justification as to why a $75 trigger is necessary.

REPower also argued that protections related to extreme weather emergencies, including the extension of deferred payment plans, is not appropriate for prepaid service.

TXU Energy agreed that there will be limited need for a deferred payment plan for prepayment customers. TXU Energy added that it believes a customer should not need a minimum of three months to pay if a 25% upfront payment is required. TXU Energy proposed that the deferral be granted for no less than the number of days deferred. TXU Energy maintained that this would be fair and equitable to the customer, and also help to protect the REP who is providing service, most likely without a security deposit or advanced payment.

Commission response

The commission does not agree with REPower that a prepayment REP should be exempt from the customer protections dealing with extreme weather emergencies, including the extension of deferred payment plans. The commission's conclusions concerning the protection from disconnection are discussed above. If customers have this protection, then a deferred payment plan is appropriate when the protection is invoked and the amount due to the REP is large. The commission agrees with REPower that a REP shall offer a deferred payment plan if a customer is underbilled. The commission believes that TXU Energy's assessment is correct, that the deferred payment plans are likely to be infrequent and the amounts deferred small. The commission believes that an appropriate balance of the interests of customers and prepay REPs is for the rule to require small deferrals to be repaid quickly, so that the customer returns to a true prepayment status quickly, and that if a large deferral occurs, the customer should be required to make an initial payment quickly. A REP may require that no more than 25% of each transaction amount be applied towards a deferred payment plan.

§25.498(f)(4)

REPower suggested changing the requirements in this section so that a deferred payment plan that lasts at least three months, and caps the maximum initial payment should only apply to deferred payment plans that a REP is required to offer under this subsection, and not to payment arrangements a REP may voluntarily offer.

Commission response

The commission agrees with REPower that the requirements pertaining to deferred payment plans shall not apply to plans that REPs may voluntarily offer.

§25.498(f)(6)(E)

REPower suggested making it clear that REPs may disconnect a customer for failure to fulfill the terms of a deferred payment plan.

Commission response

The commission agrees with REPower and has modified language in this subsection accordingly.

§25.498(g)(1)

Old subsection (g) is adopted as new subsection (h) and deals with interruption of service. Consistent with its recommendation for subsection (b)(2), Reliant stated that this subsection should be amended to clarify that service interruption may be executed at the meter by the TDU, at the request of the REP. REPower also argued that prepayment meters should not have to be programmed to not interrupt service at any time the REP's prepayment device is not readily available to take payments. REPower stated further that its PMS does not require that a customer have access to the REP's customer service center to make a payment, and therefore the requirement that a REP's customer service center be operating is unnecessary. OPUC commented that REPower did not consider the possibility that technical difficulties may arise at the kiosk, or store hours may be limited, and, thus, payment by phone may be the only remaining option.

Commission response

The commission recognizes that certain prepayment devices may have technical limitations. The commission requires in this rule that a REP use technology that is capable of providing certain customer protections as set out in this rule for the Texas market. The commission notes that there are payment systems that operate on a 24-hour-a-day basis and believes that REPs should be able to interrupt service only when a payment option consistent with this rule is available. Flexibility is one of the key benefits of prepaid services. It is also critical that each REP maintain customer service functions, with live persons to address customer inquiries during periods when service may be interrupted, for the reasons expressed by OPUC.

The commission agrees with the recommendation by Reliant that service interruption may be executed at the meter by the TDU, at the request of the REP.

§25.498(g)(2)

TXU Energy commented that the provision that a customer's electric service cannot be interrupted from 9 p.m. and 7 a.m. is unnecessary and should be removed. TXU Energy maintained that customers that sign up for these programs understand that when the balance is exhausted, service will be interrupted. TXU Energy stated that as long as pay stations or the REP's customer service center is operating, the customer can respond. The important thing, is that the REP be able to turn the power back on quickly, TXU Energy argued.

Commission response

The commission agrees with TXU Energy and has made changes in accordance with its recommendations.

§25.498(g)(3)

REPower commented that it does not believe that the provision of ill and disabled protection is appropriate for service delivered using a PMS. While REPower agreed that customers may have a serious need for electricity to maintain their health, those customers will not accrue a delinquent balance while receiving service using a PMS. Consequently, REPower recommended deleting the entire subsection.

AARP commented that it strongly supports this section, and that disconnection for seriously ill customers should be prohibited.

Commission response

The commission believes that seriously ill and critical care customers should not be allowed to take prepaid service, unless they sign a special waiver, provided by the REP, which states clearly that if the balance is exhausted, the power will be interrupted. The commission agrees with parties that have commented in this rulemaking that those customers are at higher risk under this service. The waiver is intended to warn those customers of the serious consequences that could occur resulting from disconnection of service. The commission does not agree with AARP that disconnection for seriously ill customers should be prohibited. The rule provides protection for seriously ill and critical care customers.

§25.498(g)(3)(B)

TXU Energy commented that the proposed prohibition of disconnection for 63 days if the REP receives a written statement from the attending physician should be reconsidered. At a minimum, TXU argued, the provision should be for 30 days, and the customer should provide proof each month to continue the deferral. REPower also suggested that the provision be for 30 days, from the date the REP receives the physician's statement.

Reliant suggested that this subsection be modified for purposes of consistency with §25.483(g)(2), relating to Disconnection of Service. Reliant pointed out that in the traditional credit model, the maximum duration of the disconnection deferral is 63 days from the issuance of the invoice in question. Reliant continued that in the traditional credit model, a customer is not eligible for disconnection until the 26th day following issuance of an invoice. In other words, Reliant argued, the existing rule provides a deferral of disconnection for a maximum of 37 days (63-26 = 37), when the customer would otherwise be eligible for disconnection. Because a prepay customer is eligible for disconnection immediately upon exhaustion of the prepaid balance, Reliant believes that 37 days is the equivalent protection for customers in the prepaid model.

REPower commented that this subsection should be deleted. If it is not deleted, REPower suggested that it be amended to provide prepay customers a period of 30 days, or one calendar month.

Commission response

The commission agrees with REPower that this provision should be deleted, and has revised the rule accordingly.

§25.498(g)(4)

REPower stated that it is fully willing to work with energy assistance providers to extend service. REPower commented that the requirement places the onus of action on the REP to prevent interruption of service once it has received a pledge from an assistance agency. REPower suggested amending the requirement to clarify that a customer may need to take some additional action to effectuate this protection.

Commission response

The commission believes that the provisions, as proposed, provide adequate protections for a prepaid service provider. No changes have been made in response to this comment.

§25.498(g)(4)(A)

TXU Energy commented that this provision should be rewritten from the perspective of a REP offering prepayment service. TXU Energy added that any funds pledged should go to the customer's account for prepayment service, and essentially buy the customer the amount of energy being pledged.

REPower commented that a REP using a PMS would have no means to verify if the customer will qualify for and ultimately receive a pledge from an assistance agency. This provision is not appropriate in the prepay model. REPower therefore recommended this provision be deleted.

Commission response

The commission disagrees with comments of TXU Energy and REPower. This rule ensures that customers taking prepaid service will have customer protections that are equivalent to those that customers on traditional service have, recognizing the differences in the services. The provision allowing a pledge, with a letter of intent to pay from assistance provider helps to accomplish this objective. Commentors have not provided any evidence that energy assistance agencies are making pledges and then failing to meet their obligations. Further, the commission believes that nothing prevents a REP from verifying a pledge document is real before honoring it.

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, 17.004, and 39.101.

§25.498. Retail Electric Service Using a Customer Prepayment Device or System.

(a) Application. This section applies to a retail electric provider (REP) that offers prepaid service using a customer prepayment device or system with prepayment capabilities consistent with this section.

(1) If a REP meets the requirements of this section, its prepaid service using a customer prepayment devices or system is exempt from the following requirements:

(A) §25.479(b) of this title (relating to Issuance and Format of Bills);

(B) §25.479(c)(1) of this title; and

(C) §25.480(b), (h), (i), (j), and (k) of this title (relating to Bill Payment and Adjustments).

(2) If a REP meets the requirements of this section, interruption of a customer's electric service is exempt from the requirements of §25.483 of this title (relating to Disconnection of Service), except for subsections (b)(2)(A) and (B), (d) and (e) of that section.

(b) Definitions.

(1) Customer Prepayment Device or System (CPDS)--a device or technology owned by a REP that is used to support prepayment services consistent with this section.

(2) Interruption of service--the cessation of retail electric service through the use of a CPDS.

(c) Minimum requirements for retail electric service using a customer prepayment device or system.

(1) A REP shall file with the commission a statement of intent to provide retail electric services using a CPDS prior to offering such services and provide a copy of the statement of intent to the Office of Public Utility Counsel. The statement of intent shall include a general description of its CPDS, its initial Electricity Facts Label (EFL), Terms of Service (TOS), and Disclosure Document as described in subsection (d) of this section. The commission may maintain a list of REPs who have noticed their intent to provide prepaid services pursuant to this rule.

(2) A CPDS device may either be a meter with prepayment capabilities that is owned or controlled by a REP and installed on the customer's side of the transmission and distribution utility (TDU) meter or a device or a system that can obtain usage information from advanced meter so that the customer's electric service may be interrupted if the customer's prepayment is exhausted, and interruption of electric service is not prohibited under this section. A CPDS that includes a meter installed on the customer's side of the TDU meter shall conform to the requirements and standards specified in §25.121(e) of this title (relating to Meter Requirements), §25.122 of this title (relating to Meter Records), and section 4.7.3 of the tariff for retail electric delivery service (relating to Meter Testing). A CPDS may be capable of performing other functions than those required by this section.

(3) A TDU may, at its option and upon payment of the appropriate charges, install CPDS equipment, including but not limited to, meter adapters and collars, on the customer's side of the point of delivery, and such installation shall not constitute the provision of a competitive energy service as that term is defined in §25.341(3) of this title (relating to Definitions).

(4) A CPDS, including any associated communication equipment, shall not cause harmful interference with the operation of the TDU meter or equipment, or the performance of any of the services of the TDU. If a CPDS is incorrectly installed or interferes with the TDU meter or equipment, or TDU services, the CPDS shall be promptly corrected or removed.

(5) A REP shall not deploy a CPDS that has not been successfully installed in at least 500 residences in North America, Australia, Japan, or Western Europe. Upgrades to existing CPDS or other equipment used as part of prepayment service are not subject to this requirement. No CPDS that violates the test calibration limits as set by the American National Standards Institute, Incorporated shall be placed in service or left in service. Whenever a test indicates a CPDS violates these limits, the CPDS shall promptly be replaced or made to comply with these limits.

(6) Prepaid retail electric service shall include a means by which the REP may communicate the information required by this subsection to the customer, such as, but not limited to, a customer information unit in the customer's premises, email, telephone, or mobile phone communications or other electronic communications as described in the REP's terms of service. If a REP offers multiple means by which it communicates information required by this subsection to the customer, it shall allow the customer to choose the means by which the customer receives communication.

(7) Prepaid retail electric service shall include a means by which the customer may make payments for service at the customer's premises by phone, internet, or other means that can be accomplished in the premises, or at a location near the customer's premises. The payment mechanism may include a requirement that a customer who has made a payment to subsequently verify the payment using a card, code, or other similar method.

(8) A REP offering retail electric service using a CPDS shall:

(A) allow a customer to prepay a REP for electric service;

(B) communicate to the customer the customer's current balance, time and date, electricity rate, and estimated time or days of paid electricity remaining;

(C) communicate to the customer the name of the REP and the REP's toll-free customer service telephone number;

(D) communicate a warning to the customer at an event trigger explained in the customer's TOS and Disclosure Document, at least three days and not more than seven days before a customer's prepaid balance is estimated to drop to zero or at a dollar amount specified in the TOS;

(E) when a customer makes a payment, provide in writing, a receipt or confirmation of payment or confirmation code that includes the customer's account number, or (ESI ID), payment amount, and itemization of any charges in addition to the prepayment or provide a confirmation code that will permit the customer to access such information; and, if applicable, a statement in writing that indicates that the customer is receiving the LITE-UP Discount pursuant to §25.454 of this title (relating to Rate Reduction Program); and

(F) ensure that the CPDS can be removed or switched into bypass mode for customers who choose a different REP or an electric service that does not require prepayment. When a REP receives advance notice that a customer using a CPDS has chosen a new provider, the REP must remove or switch the device into bypass mode on a schedule that is consistent with the effective date stated on the ERCOT enrollment transaction and the rules or guidelines for processing such transactions.

(9) The communication provided under paragraph (8)(B) of this subsection shall either be available to the customer continuously, or the information to the customer by the REP shall be provided within two hours of the request. Nothing in this subsection precludes a customer from receiving a payment and usage summary, in accordance with subsection (f) of this section.

(10) The communications required under this subsection shall be available in English or Spanish, at the customer's election.

(11) A REP shall cooperate with energy assistance agencies to facilitate the provision of energy assistance payments to requesting, eligible customers.

(12) The following provisions apply to a REP providing prepay service using a CPDS except for service provided pursuant to §25.142 of this title (relating to Submetering for Apartments, Condominiums, and Mobile Home Parks). A REP shall not:

(A) tie the duration of an electric service contract to the duration of a tenant's lease;

(B) require that a tenant select the REP as a condition of a lease;

(C) allow the property owner or owner's agent designated as the customer of record to disconnect service or request disconnection of prepaid service provided to the prepay customer, except as provided in §25.483(d) of this title;

(D) require a minimum prepayment transaction amount by a customer; and

(E) collect security deposits pursuant to §25.478 of this title (relating to Credit Requirements and Deposits). A REP, however, may collect an equipment deposit to ensure the return of equipment that is within the control of the customer.

(13) A REP providing electric service using a CPDS shall be not charge a customer any fees for the cancellation of service, company removal of equipment or any other purpose when the customer switches to another REP or otherwise discontinues taking prepaid electric service.

(d) Disclosures. In addition to the other disclosures required by this title, REPs shall provide customers a Disclosure Statement that notifies customers of the nature of the service, and shall provide customers a copy of the disclosure signed by the person taking prepaid service, or if the person taking prepaid service is a tenant in a residential property in which the property manager is acting as an agent of the REP, a copy of the disclosure signed by both the person taking prepaid service and the property owner or property owner's agent. The Disclosure Statement:

(1) shall be, at a minimum, written in 12-point font;

(2) shall be prominently displayed in the property management office of any single location at which the REP is offering service to multiple tenants and the landlord or property manager is acting as an agent of the REP;

(3) shall prominently state that the continuation of service depends on the customer prepaying for service on a timely basis and that if the customer's prepayment balance is exhausted, the customer's service may be interrupted;

(4) shall provide notice to the customer that he or she has the right to choose an electric service that does not require prepayment;

(5) shall inform the customer:

(A) the amount and terms and conditions of any equipment deposits that may apply;

(B) the acceptable form(s) of payment, payment location(s) and hours, and instructions on how to make payments;

(C) how service can be interrupted and the consequences of interruption;

(D) of the wavier provision for service to critical care and seriously ill customers;

(E) the availability of and payments related to deferred payment plans; and

(F) the availability of energy bill payment assistance.

(e) Notice of customer names of record; notification and obligations. A REP offering retail electric service using a CPDS may designate a property owner or the owner's agent as the customer of record for the purpose of transactions with the Electric Reliability Council of Texas (ERCOT) and the TDU.

(1) For each electric service identifier (ESI ID) at which a REP chooses to designate a property owner or the owner's agent as the customer of record, the REP shall provide the TDU the name, service and mailing addresses, and (ESI ID) of each end-use customer taking prepaid service with such a device, and keep that information updated as required in the TDU Tariff for Retail Delivery Service.

(2) The REP shall treat each end-use customer taking prepaid service with a CPDS as a customer for purposes of this subchapter, including §25.471 of this title (relating to General Provisions of Customer Protection Rules). Nothing in this subsection affects a REP's responsibility to provide customer billing contact information to ERCOT in the format required by ERCOT.

(f) Payment and Usage Summary.

(1) REPs providing retail electric service using a CPDS are not required to issue traditional bills or invoices to their customers. A REP using a CPDS shall issue a payment and usage summary of electric charges to each prepaid electric service customer upon request. A summary of electric charges shall be in writing and delivered by the REP's employee or agent or by the United States Postal Service; or, if the customer agrees in writing, by an electronic means of communications that provides a durable record of the summary.

(2) A summary of electric charges shall include the following information:

(A) The certified name and address of the REP and the number of the license issued to the REP by the commission;

(B) A toll-free telephone number, in bold-face type, that the customer can call during specified hours for inquires and to make complaints to the REP about the summary of electric charges;

(C) The name, account number or ESI ID of the customer, and the service address of the customer;

(D) The dates and amounts of payments made during the period covered by the summary;

(E) A summary of the customer's consumption during the period covered by the summary;

(F) Unless another time period is requested by the customer, the payment and usage data for 12 months, if available.

(3) A REP shall maintain records necessary to produce a summary of electric charges for the most recent 24 months.

(4) Pursuant to §25.472(b)(1)(D) of this title (relating to Privacy of Customer Information), within one business day of receiving a request from a customer or an energy assistance agency, a REP providing retail electric service using a CPDS shall provide a summary of electric charges showing a customer's electric payments and usage for the lesser of the duration of the customer's service with the REP, or one year. This information shall be provided free of charge to an energy assistance agency.

(g) Deferred payment plans. A deferred payment plan for a customer taking prepaid service using a CPDS is an agreement between

the REP and a customer that allows a customer to pay a deficit balance of $50 or larger that may have accrued on an account, in installments. A deferred payment plan may be established in person or by telephone, but shall be confirmed in writing by the REP.

(1) A REP shall offer a deferred payment plan to customers, upon request, whose prepaid account balance is exhausted during an extreme weather emergency, in accordance with paragraph (5) of this subsection.

(2) A REP shall offer a deferred payment plan to a customer who has been underbilled, as described in §25.480(e) of this title in accordance with paragraph (5) of this subsection.

(3) For customers who have expressed an inability to pay, a REP may offer a deferred payment plan. Such a plan is not subject to paragraph (5) of this subsection.

(4) A REP shall not refuse a customer's participation in any deferred payment plan on any basis set forth in §25.471(c) of this title.

(5) A deferred payment plan required by this subsection shall provide that any deferred payment shall be paid in installments. A REP may require that no more than 25% of each transaction amount be applied towards the deferred payment plan.

(6) A copy of the deferred payment plan shall be provided to the customer and:

(A) shall include a statement, in clear and conspicuous type, that states, "If you are not satisfied with this agreement, or if the agreement was made by telephone and you believe this does not reflect your understanding of that agreement, contact (insert name of REP)." In addition, where the customer and the REP's representative or agent meet in person, the representative shall read the preceding statement to the customer;

(B) may include a penalty not to exceed 5.0% for late payment, but shall not include a finance charge;

(C) shall state the percentage of each transaction that will be applied towards the plan;

(D) shall state the total amount to be paid under the plan;

(E) shall state that a customer's electric service will be interrupted if the customer does not fulfill the terms of the deferred payment plan, and;

(F) shall allow either the customer or the REP to initiate a renegotiation of the deferred payment plan if the customer's economic or financial circumstances change substantially during the time of the deferred payment plan.

(7) A REP providing prepay electric service using a CPDS may pursue disconnection of service if a customer does not meet the terms of a deferred payment plan. However, service shall not be disconnected until appropriate notice has been issued, pursuant to §25.483(c)(1) of this title, notifying the customer that the customer has not met the terms of the plan.

(h) Interruption of electric service.

(1) A REP shall not allow a customer's electric service to be interrupted on a weekend day because the customer's prepaid balance has been exhausted, or during any period in which the prepayment mechanisms are not available or the REP's customer service center is not operating.

(2) If the REP receives a pledge, letter of intent, purchase order, or other notification from an electric assistance provider that it is forwarding payment to be added to the customer's account balance, the REP shall either immediately credit the customer's account with the amount of the pledge, or not allow a customer's electric service to be interrupted.

(A) A REP may require the customer to take steps necessary to ensure the customer's CPDS records the payment, such as a revaluing transaction.

(B) A REP may disconnect or interrupt a customer's electric service if payment from the energy assistance provider's commitment is not timely received, or if the customer fails to pay any portion of the amount not covered by the commitment.

(3) A REP shall not allow a customer's electric supply service to be interrupted because the prepaid balance has been exhausted during an extreme weather emergency in the county in which the service is provided.

(A) The definition of "extreme weather emergency" under this section shall be the same as its definition in §25.483(i)(1) of this title.

(B) During an extreme weather emergency, a REP shall offer a residential customer a deferred payment plan upon request by the customer that complies with the requirements of subsection (g)(1) of this section.

(4) Where a customer's electric service has been interrupted for failure to maintain a positive credit balance, the service must be restored no later than the times required by §25.483(m) of this title, until June 1, 2008, at which service must be restored within two hours.

(5) A customer's service may be interrupted if a customer fails to comply with a deferred payment plan.

(i) Service to Critical Care Customers and the Seriously Ill. If a customer or applicant provides information that the TDU has qualified such person a critical care customer or if the customer or applicant states that interruption of electric service will cause a person residing at the customer's residence to become seriously ill or more seriously ill, a REP shall refuse to provide prepayment service using a CPDS, if the customer does not sign a waiver, provided by the REP, which states the customer understands the medical risks associated with the fact that retail electric service can be interrupted. If a customer chooses not to sign such a waiver, the REP shall work with the customer to transition the customer to another product or provider in a manner that avoids a service disruption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 22, 2007.

TRD-200703818
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: September 11, 2007
Proposal publication date: February 23, 2007
For further information, please call: (512) 936-7223

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT
SUBCHAPTER D. LOTTERY GAME RULES

16 TAC §401.310

The Texas Lottery Commission (Commission) adopts amendments to §401.310 (relating to Payment of Prize Payments Upon Death of Prize Winner), without changes to the proposed text as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4317).

The purpose of the adopted rule amendments is to clarify for the public current agency practices and procedures to be followed if a lottery installment prize winner, who claimed the prize in an individual capacity, dies before all the unassigned lottery prize installment payments have been paid and to clarify how the remaining unassigned lottery prize installment payments would be made in accordance with the adopted rule amendments. The key changes made by the adopted amendments are a rewrite of the first section of the rule to make it easier to understand and apply; to require a more thorough investigation of any unknown heirs, beneficiaries, or claimants of the estate by the ad litem appointed by the probate court; to allow additional language to be required by the Commission, depending on the specific circumstances of the underlying probate matter; and to remove the current administrative fee which is not expressly authorized by statute. Since its original adoption in 1996, this rule has been applied approximately three times, the most recent in 2006. After the most recent experience, staff recognized a need to refine and clarify the process for the general public to benefit from the use of this rule.

No comments were received during the public comment period.

The amendments are adopted under Texas Government Code, §466.015, which provides the Texas Lottery Commission with the authority to adopt rules governing the operation of the lottery. The section is also adopted under Texas Government Code, §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703878
Kimberly L. Kiplin
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Effective date: September 13, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 344-5012

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CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES
SUBCHAPTER A. ADMINISTRATION

16 TAC §402.100

The Texas Lottery Commission (Commission) adopts amendments to §402.100 (relating to Definitions), with changes to the proposed text as published in the July 13, 2007, issue of the *Texas Register,* (32 TexReg 4319). Specifically, the change adds the phrase, "or a member of the board of directors" to the definition of "bingo chairperson."

The purpose of the adopted amendment is to add a definition for "bingo chairperson" in order to clarify the term as used in other proposed rules that are being drafted. The existing definitions are renumbered accordingly. Licensees will benefit because the adopted amendment provides clarification and guidance relating to identifying an individual who will be the contact person for any bingo related activities between the organization and the Commission.

A public comment hearing was held on July 16, 2007. One member of the public was present at the hearing, a representative from the State VFW and its member posts, and generally commented in favor of the amendments. Two written comments were received.

Comment: Mandating that the bingo chairperson be an officer may be too strict for some smaller organizations. The meaning of the word "officer" needs to be clarified. If "officer" refers to those officers designated in the bylaws, you probably would have a lot of organizations that would not meet that standard. However, if "officer" means someone who is given formal status with the organization to be in charge of bingo (not someone recognized in the bylaws as being an officer), the amendments to the rule would be sufficient.

Agency Response: The agency agrees that the proposed definition might be too narrow for some smaller organizations and has expanded the definition by adding the language "or a member of the board of directors" to the definition of a bingo chairperson.

Comment: Officers of the non-profit organizations already have responsibilities that require their time and effort. They do not need any additional demands on their volunteer time. This might also require changes in bylaws or organizing instruments of some organizations. Organizations have already appointed a primary operator whose name must appear on license renewals, temporary licenses, etc., they have already been designated in writing as "the bona fide active member *who will be primarily responsible for conducting your bingo game and filing quarterly reports*" as per the "Texas Application for An Original License to Conduct Charitable Bingo". The primary operator, therefore, has already been designated in writing by the organization as responsible for overseeing the organization's bingo activities. So, it makes sense that the primary operator would be the individual reporting to the membership relating to those activities.

Agency Response: The primary operator is responsible for the day-to-day conduct of the bingo games. The bingo chairperson is responsible for the oversight for the entire bingo operation. There is nothing in the Bingo Enabling Act or the Charitable Bingo Administrative Rules that would prohibit a bingo chairperson from being the primary operator, but a primary operator must be an officer or a member of the board of directors to be the bingo chairperson.

The amendment is adopted under Occupations Code, §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act. The section is also adopted under Texas Government Code, §467.102, which provides the Commission with the authority to adopt rules

for the enforcement and administration of the laws under the Commission's jurisdiction.

§402.100. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Bingo chairperson--An officer or a member of the board of directors of a licensed authorized organization who is designated in writing by the organization as responsible for overseeing the organization's bingo activities and reporting to the membership relating to those activities.

(2) Bingo premises--The area subject to the direct control of, and actual use by, a licensed authorized organization for the purpose of conducting a game of bingo.

(3) Break-open bingo ticket--An instant bingo card commonly known as an instant bingo ticket, pull-tab bingo game or instant bingo card as defined by §402.300 of this chapter.

(4) Calendar week--A period of seven consecutive days commencing with Sunday and ending with Saturday.

(5) Calendar year--A period of 12 consecutive months commencing with January 1 and ending with December 31.

(6) Card-minding device--Any mechanical, electronic, electromechanical or computerized device, and including related hardware and software, that is interfaced with or connected to equipment used to conduct a game of bingo and which allows a player to store, display, and mark a bingo card face five spaces wide by five spaces long, the center space free, and the other spaces containing pre-printed numbers between 1 and 75, inclusive. A card-minding device shall not be a video lottery machine as defined by H.B. 3021, §10, 74th Leg. R.S., 1995.

(7) Commission--The Texas Lottery Commission, the agency created by H.B. 54, 72nd Leg., 1st C.S. (1991), as amended by H.B. 1587 and H.B. 1013, 73rd Leg. R.S., 1993.

(8) Conductor--A licensed authorized organization.

(9) Director--The Director of the Charitable Bingo Operations Division, commonly known as the bingo division, of the Commission.

(10) Executive Director--The Executive Director of the Commission.

(11) Instant bingo card--An instant bingo ticket, pull-tab bingo game, break-open bingo ticket or instant bingo card as defined by §402.300 of this chapter.

(12) Instant bingo ticket--An instant bingo card commonly known as a break-open bingo ticket, a pull-tab bingo game or an instant bingo card as defined by §402.300 of this chapter.

(13) Location--The area subject to the direct control of, and actual use by, a licensed authorized organization for the purpose of conducting a game of bingo.

(14) Operator--A natural person designated pursuant to authority of the Bingo Enabling Act.

(15) Place--The area subject to the direct control of, and actual use by, a licensed authorized organization for the purpose of conducting a game of bingo.

(16) Primary business office--The physical location at which all records relating to the primary purpose(s) of a licensed authorized organization are maintained in the ordinary course of business.

(17) Pull-tab bingo game--An instant bingo card commonly known as a break-open bingo ticket, an instant bingo ticket or an instant bingo card as defined by §402.300 of this chapter.

(18) 24-hour period--A period of 24 consecutive hours commencing at 12:00 midnight.

(19) Working day--Other than a Saturday, Sunday or holiday authorized by law, a period of nine consecutive hours commencing at 8:00 a.m. and ending at 5:00 p.m.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703876
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: September 13, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 344-5012

♦ ♦ ♦

16 TAC §402.102

The Texas Lottery Commission (Commission) adopts the repeal of §402.102 (relating to Bingo Advisory Committee), without changes to the proposed text as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4320). The text will not be republished.

The repeal is adopted concurrently with the adoption of a new rule at Title 16, Part 9, Chapter 402, Subchapter A, §402.102 (relating to Bingo Advisory Committee). The purpose of the repeal is to permit adoption of the new rule that has a different format and additional information about the Bingo Advisory Committee.

Interested persons will benefit from the adopted repeal of the existing Bingo Advisory Committee rule and subsequent adopted new Bingo Advisory Committee rule because the new rule is more reader friendly for interested parties to obtain answers to their questions about the Bingo Advisory Committee.

A public comment hearing was held on July 16, 2007. One member of the public was present at the hearing, but did not comment on the repeal. No written comments were received.

The repeal is adopted under Occupations Code, §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act. The section is also adopted under Texas Government Code, §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703875

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: September 13, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 344-5012

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16 TAC §402.102

The Texas Lottery Commission (Commission) adopts new §402.102 (relating to Bingo Advisory Committee), with changes to the proposed text as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4321). Specifically, the changes include changing the word "concern" to "problem", and adding language to clarify that nominations may be submitted at other times for unexpected vacancies. The adopted version of the rule also corrects a typographical error in proposed subsection (j). "Texas Public Information Act" has been changed to "Open Meetings Act."

The Commission adopts the new rule to provide information on the composition, appointment, and duties of the Bingo Advisory Committee (BAC). The adopted new rule will benefit interested persons because it is more understandable and contains answers to questions about the Bingo Advisory Committee. The adopted new rule also includes new language regarding how the Commission selects and appoints Bingo Advisory Committee members.

A public comment hearing was held on July 16, 2007. One member of the public, a representative of the State VFW and its member posts, was present at the hearing and generally commented in favor of the rule. One written comment was received. Comment: Some people think the word "problem" has a negative connotation, and that is probably why the staff made the change in subparagraph (a)(1)(A) from "problems" to "concerns." Assuming that the BAC could bring to the Commission a problem within the industry, then the language as published is fine. Alternatively, if you look at legislative history guidelines, when an agency or a legislature strikes a word and inserts in lieu a different word, that usually means they no longer want that previous word to be considered operative. The commenter does not think it is the intent of the Commission that members of the BAC could not bring a problem to the agency. Nonetheless, that could be one interpretation of the language in dropping out the word "problem" and inserting "concern."

Agency Response: The agency agrees with the commenter and has changed the word "concern" to "problem" in order to be clearly consistent with language in Tex. Occ. Code, §2001.057.

Comment: In paragraph (d)(1), the language suggests that individuals can only submit a nomination form during the 60-day period beginning on March 1 and ending on April 30 each year. The intent of the rule should be to allow nominations to be submitted at a later time for an unexpected vacancy.

Agency Response: The agency agrees with the commenter and has added language to clarify that nominations may be submitted at other times for unexpected vacancies.

Comment: In paragraph (e)(3), the staff is required to provide the BAC at the first meeting after June 1 each year, the names of the nominees the staff will recommend. If a vacancy occurred on December 1, after this period had run, the language suggests the staff could not provide to the BAC any other names it would recommend. If there are unexpected vacancies, the rule ought to allow those vacancies to be considered and filled.

Agency Response: The agency agrees with the commenter and has added language to clarify that nominations will be provided to the BAC at other times for unexpected vacancies.

Comment: In subsection (k), the language states that a member cannot send a proxy vote on an item to be considered by the BAC. Proxy voting occurs regularly in publicly and privately held organizations. In certain governmental agencies, the agency appointees can vote by proxy. It seems a little harsh that, if an individual, for whatever reason, such as a personal emergency, cannot attend, that they could not submit a proxy vote to another member of the BAC on an issue that they care about. The agency might consider using the guidelines of Robert's Rules of Order.

Agency Response: The agency disagrees. The purpose of a Bingo Advisory Committee meeting is to provide each member an opportunity to share experience, knowledge, and judgment on matters considered by the committee as a whole. The vote of a member who does not attend and has not heard the committee's discussion about an issue cannot meaningfully contribute to a decision that must be reached by the committee acting as a whole.

Comment: The commenter questions the appropriateness of the Executive Director's involvement with decisions concerning bingo and indicated that such involvement should be the responsibility of the Charitable Bingo Operations Division Director.

Agency Response: The agency disagrees with the commenter. There may be times that the Commission may desire to receive input from the Executive Director during the nomination process.

The new rule is adopted under Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act. The section is also adopted under Texas Government Code, §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

§402.102. Bingo Advisory Committee (BAC).

(a) What is the purpose of the Bingo Advisory Committee (BAC)?

(1) The purpose of the BAC is to:

(A) advise the Commission on the needs and problems of the state's bingo industry;

(B) report the activities of the BAC to the Commission; and

(C) perform other duties as directed by the Commission.

(2) The BAC's sole duty is to advise the Commission.

(3) The BAC has no executive or administrative powers or duties with respect to the operations of the Charitable Bingo Operations Division.

(b) What is the composition of the Bingo Advisory Committee?

(1) The Commission may appoint nine persons as members of the BAC.

(2) The Commission must appoint members to represent the following interest groups:

(A) the public,

(B) conductors that are not licensed commercial lessors,

(C) conductors that are licensed commercial lessors,

(D) commercial lessors, and

(E) system service providers.

(3) The Commission may appoint members to represent:

(A) licensed manufacturers, and

(B) licensed distributors.

(4) If there is not an individual to represent one of the required interest groups, the Commission may appoint a member from the remaining interest groups.

(c) What are the minimum eligibility requirements to serve on the BAC?

(1) A member may not represent a licensee that is delinquent in payment of any prize fees or gross rental taxes for which a final jeopardy determination has been made by the Commission.

(2) A member may not represent a licensee that has a license denied, revoked or suspended by the Commission.

(3) A member representing the public may not be an individual who is required by statute to be listed on a conductor, commercial lessor, manufacturer, or distributor license application.

(4) A member must meet the criminal history standards in Bingo Enabling Act Sections 2001.105(b), 2001.154(a)(5), 2001.202(1), 2001.207(1), and 2001.252(1).

(5) A nominee for membership must provide complete and accurate information on the nomination form.

(d) How are members nominated to serve on the BAC?

(1) Individuals may submit a nomination form during the regular nomination period which begins on March 1 and ends on April 30 each year and at other times if there is an unexpected member vacancy.

(2) Nomination forms are available from the Charitable Bingo Operations Division or the Commission's web site.

(e) What is the appointment process?

(1) Charitable Bingo Operations Division staff verify eligibility of nominees and send all nominations that meet minimum requirements to each Commissioner.

(2) Charitable Bingo Operations Division staff rank the nominations with advice and consultation of the Executive Director as appropriate.

(3) Charitable Bingo Operations Division staff provide to the BAC at the first meeting after June 1 each year, and at other times if there is an unexpected member vacancy, the names of those nominees that staff will recommend to the Commissioners.

(4) The BAC may be a resource to the Commission by reviewing nominations, interviewing prospective members, and submitting its recommendations to the Charitable Bingo Operations Division and the Commissioners for consideration. However, the BAC will not act to exclude nominees.

(5) Each Commissioner may interview those nominees recommended by staff or other nominees.

(6) The Commissioners may appoint a nominee based on staff or BAC recommendation or may appoint any other nominee.

(f) How long may members serve on the BAC?

(1) The Commission appoints each member to serve for a three-year term or until the Commission appoints a successor.

(2) Members serve staggered terms of three years so that three members' terms expire August 31 each year.

(3) Each member serves at the pleasure of the Commission.

(g) May a BAC member be removed from the BAC before the member's term has expired?

(1) The Commission may remove a member at any time for failure to meet the eligibility requirements described in subsection (c).

(2) The Commission may remove a member for failure to attend two consecutive, regular scheduled meetings for any reason.

(h) When and where does the BAC meet?

(1) The BAC must meet quarterly but may meet more frequently at the Commission's request.

(2) Quarterly BAC meetings must be held at the Commission headquarters in Austin, Texas, except one quarterly meeting per year may be held at a location in Texas other than Austin, subject to the discretion of the Charitable Bingo Operations Division Director.

(i) Who conducts the BAC meeting?

(1) The BAC must annually select a presiding officer to conduct meetings and general business.

(2) The presiding officer must designate a member of the BAC to conduct meetings and general business in the presiding officer's absence.

(j) Are BAC meetings open to the public? BAC meetings shall be open meetings in accordance with the Open Meetings Act, Texas Government Code, Chapter 551.

(k) May a member send a substitute person or proxy vote to a BAC meeting? A member may not send a substitute person or proxy vote to a meeting.

(l) Are minutes kept of BAC meetings?

(1) The BAC must keep minutes of each meeting reflecting all formal action taken.

(2) The BAC may consider a transcript prepared by a court reporter to be the minutes of the meeting.

(3) The BAC must approve the minutes at its next meeting, and file the approved minutes with the Charitable Bingo Operations Division Director.

(m) What is the BAC's annual workplan?

(1) The BAC must submit to the Commission for approval at the first meeting after September 1 each year a workplan to guide the activities of the BAC for the following year.

(2) The workplan will contain those items that the BAC and the Commission determine are relevant to the state of the bingo industry.

(n) What are the BAC's reporting requirements?

(1) The BAC must report their activities quarterly to the Commission, although the Commission may require reporting more frequently.

(2) The BAC will report annually to the Commission the BAC's perspective on the state of the charitable bingo industry in Texas with specific comments on the following:

(A) gross receipts;

(B) net receipts;

(C) charitable distributions;

(D) expenses;

(E) attendance; and

(F) any other matter requested by the Commission.

(3) At the first Commission meeting held after September 1 each year, the BAC will provide to the Commission a report of its activities as they relate to the workplan approved by the Commission the previous year.

(o) When does the BAC cease to exist? The BAC will cease to exist annually on August 31, unless the Commission, prior to August 31, votes to continue the BAC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 24, 2007.

TRD-200703877
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: September 13, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 344-5012

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TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS

CHAPTER 131. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER A. ORGANIZATION OF THE BOARD

22 TAC §131.15

The Texas Board of Professional Engineers adopts an amendment to §131.15, relating to Committees, without changes to the proposed text as published in the June 1, 2007, issue of the *Texas Register* (32 TexReg 2971) and will not be republished.

The adopted rule change extends the term of the Joint Advisory Committee on the Practice of Engineering and Architecture until September 1, 2011.

No comments were received regarding the Board's adoption of the amended section.

The amendment is adopted pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own, proceedings, and the regulation of the practice of engineering in this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703769
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: September 10, 2007
Proposal publication date: June 1, 2007
For further information, please call: (512) 440-7723

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CHAPTER 137. COMPLIANCE AND PROFESSIONALISM

SUBCHAPTER A. INDIVIDUAL AND ENGINEER COMPLIANCE

22 TAC §137.13

The Texas Board of Professional Engineers adopts an amendment to §137.13, relating to Inactive Status, without changes to the proposed text as published in the June 1, 2007, issue of the *Texas Register* (32 TexReg 2972) and will not be republished.

The adopted rule change will allow a license holder with a delinquent license to renew and convert their license to inactive status without having to first meet active status requirements including continuing education hours

No comments were received regarding the Board's adoption of the amended section.

The amendment is adopted pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own, proceedings, and the regulation of the practice of engineering in this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703770
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: September 10, 2007
Proposal publication date: June 1, 2007
For further information, please call: (512) 440-7723

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PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 271. EXAMINATIONS

22 TAC §271.2

The Texas Optometry Board (Board) adopts amendments to §271.2 without change to the proposed text published in the June 15, 2007, issue of the *Texas Register* (32 TexReg 3460).

The adopted amendments concern the requirements for license application. The amendments clarify when college and optometry school transcripts must be submitted to the Board.

No comments were received.

The amendments are adopted under the Texas Optometry Act, Texas Occupations Code, §351.151, and §351.254. No other sections are affected by the adopted amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession and §351.254 as setting the educational requirements for license as an optometrist.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703855
Chris Kloeris
Executive Director
Texas Optometry Board
Effective date: September 12, 2007
Proposal publication date: June 15, 2007
For further information, please call: (512) 305-8502

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CHAPTER 273. GENERAL RULES

22 TAC §273.8

The Texas Optometry Board adopts amendments to §273.8 without change to the proposed text published in the June 15, 2007, issue of the *Texas Register* (32 TexReg 3461).

The adopted amendments concern reinstatement of expired licenses and reexamination requirements for expired licenses. The amendments clarify the type of examination required for licenses that have expired, including therapeutic license requirements. For expired licenses where the optometrist is practicing in another state, the adopted amendments require the applicant for reinstatement to obtain an official license verification from all states in which the optometrist is licensed and clarifies that §351.501 of the Optometry Act applies to license reinstatements.

No comments were received.

The amendment is adopted under the Texas Optometry Act, Texas Occupations Code, §§351.151, 351.252, 351.304, 351.306, and 351.501. No other sections are affected by the adopted amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession, §351.252 as setting the requirements for therapeutic license, §351.304 to require reexamination upon license expiration, §351.306 to allow reinstatement of an expired license if the former licensee is practicing out of state, and §351.501 as defining the conduct by applicants or licensees that allow the agency to refuse to issue a license or impose disciplinary action.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 23, 2007.

TRD-200703854
Chris Kloeris
Executive Director
Texas Optometry Board
Effective date: September 12, 2007
Proposal publication date: June 15, 2007
For further information, please call: (512) 305-8502

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PART 19. POLYGRAPH EXAMINERS BOARD

CHAPTER 391. POLYGRAPH EXAMINER INTERNSHIP

22 TAC §391.3, §391.4

The Polygraph Examiners Board (board) adopts amendments to §391.3, concerning Internship Training Schedule and §391.4, concerning State Examinations for Polygraph Examiners License, without changes to the proposed text as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4323) and will not be republished.

Section 391.3(10) is amended to better clarify the rule.

Section 391.4(1) is amended to allow for a change in testing procedures.

There were two commenters who agreed with the rule change concerning §391.3(10). The first comment stated the board can only regulate within the state. The second was a comment in general relating to increasing the professionalism of our field. The board considered the comments in their discussion.

The following comments concern §391.4(1): There was a letter signed by 52 individuals against the change. Two of the individuals later changed their position, stating what they were told when they signed the letter was one sided. The reasons given for not supporting the change are listed as follows: Taking portions of the licensing examination after graduating from polygraph school allows the student to take the licensing exam while the information is still fresh. Taking portions of the licensing examination after graduating polygraph school allows the board to see if the students were taught in basic polygraph school. Another reason stated was there is no benefit identified for making the intern wait until the end of the internship to take the exam.

There were two letters supporting the change. The first letter was signed by two individuals stating, "We believe that the proposed changes are indeed needed to increase the professionalism of our field." The other letter stated the licensing exam is too easy, no one fails.

The board considered the comments in their discussion.

Comments regarding §391.5 are listed below. Section 391.5 was also proposed for publication in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4323). However, it is not being adopted at this time.

There was a letter signed by 52 individuals against the change. Two of the individuals later changed their position, stating what they were told when they signed the letter was one sided. The reasons given for not supporting the change are listed as follows. There needs to be a clarification of the word "Present". The rule change would place an undue burden on small police agencies. There would be impossible hardships on small agencies (expense factor), going back to the old way is regression when we can use present day technology. What problems are we trying to solve with this change? How successful has the remote sponsorship been?

There were five letters supporting the change. One letter was signed by two individuals stating, "We believe that the proposed changes are indeed needed to increase the professionalism of our field." Another letter stated, "having a seasoned examiner present is critical. It's easier to implement corrective procedures. Also, written polygraph subjects the families, the investigators, parole and probation officers, the crime victims, and all others concerned. Those individuals deserve the best possible examination that cannot be done by an intern from a distance."

Another writes, "I encourage and support the rule change that would again require intern sponsors to have constant and direct supervision of their interns until the board has ascertained by examination the intern's competence to administer polygraph examination without supervision."

Another person wrote, "I am certain that close supervision kept me from making many mistakes. My sponsor's close guidance not only gave me confidence it gave me competence. I ended my internship with a much broader knowledge base than what I would have had if I undergone supervision from a remote location."

The board considered the comments in their discussion and is still working on this proposed rule. The rule change was voted down, and a committee was formed to work on new language.

The amendments are adopted under the Polygraph Examiners Act, Texas Occupations Code, Chapter 1703, which provides the board with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Polygraph Examiners Act, Texas Occupations Code, Chapter 1703.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 20, 2007.

TRD-200703729
Frank DiTucci
Executive Officer
Polygraph Examiners Board
Effective date: September 9, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 424-2058

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22 TAC §391.8

The Polygraph Examiners Board (board) adopts an amendment to §391.8, concerning Applicant With Out-of-State License, without changes to the proposed text as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4323) and will not be republished.

Section 391.8 is amended to allow a change in testing procedures.

There was one comment against the rule change. The respondent wrote that examiners licensed in other states should only have to take a licensing exam over Texas laws. There were two comments that favored the change. The first of those letters was signed by two individuals who felt the proposed changes would increase professionalism. The second response stated the licensing exam is so easy everyone passes.

The board considered the comments in their discussion.

The amendment is adopted under the Polygraph Examiners Act, Texas Occupations Code, Chapter 1703, which provides the board with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Polygraph Examiners Act, Texas Occupations Code, Chapter 1703.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 20, 2007.

TRD-200703730
Frank DiTucci
Executive Officer
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Effective date: September 9, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 424-2058

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CHAPTER 393. GENERAL

22 TAC §393.9

The Polygraph Examiners Board (board) adopts new §393.9, concerning Bonds and Insurance, without changes to the proposed text as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4325) and will not be republished.

New §393.9 is adopted to better identify those parties authorized to offer for sale bonds or insurance policies in the state of Texas.

There were two comments that agreed with the rule change. The first response stated it was administrative and was probably needed. The other was a response in general relating to increasing the professionalism of our field.

The board considered the comments in their discussion.

The new rule is adopted under the Polygraph Examiners Act, Texas Occupations Code, Chapter 1703, which provides the board with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Polygraph Examiners Act, Texas Occupations Code, Chapter 1703.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 20, 2007.

TRD-200703731
Frank DiTucci
Executive Officer
Polygraph Examiners Board
Effective date: September 9, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 424-2058

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CHAPTER 395. CODE OF OPERATING PROCEDURE OF POLYGRAPH EXAMINERS

The Polygraph Examiners Board (board) adopts the repeal and replacement of §395.14, concerning No Texas Address, new §395.15, concerning Authority to Work in the United States and an amendment to §395.16, concerning Unauthorized Examination, without changes to the proposed text as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4325) and will not be republished.

The repeal and replacement of §395.14 is adopted to better clarify the process of registering a persons license.

New §395.15 is adopted to better identify persons legally entitled to work in Texas.

New §395.16 is adopted to better identify the examiner.

Comments regarding §§395.14, 395.15, and 395.16 are as follows: There were two comments that agreed with the rule change. The first response stated it was administrative and was probably needed. The other was a response in general relating to increasing the professionalism of our field.

The board considered the comments in their discussion.

22 TAC §395.14

The repeal is adopted under the Polygraph Examiners Act, Texas Occupations Code, Chapter 1703, which provides the board with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Polygraph Examiners Act, Texas Occupations Code, Chapter 1703.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 20, 2007.

TRD-200703732
Frank DiTucci
Executive Officer
Polygraph Examiners Board
Effective date: September 9, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 424-2058

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22 TAC §§395.14 - 395.16

The amendment and new sections are adopted under the Polygraph Examiners Act, Texas Occupations Code, Chapter 1703, which provides the board with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Polygraph Examiners Act, Texas Occupations Code, Chapter 1703.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 20, 2007.

TRD-200703733
Frank DiTucci
Executive Officer
Polygraph Examiners Board
Effective date: September 9, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 424-2058

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 465. RULES OF PRACTICE

22 TAC §465.3

The Texas State Board of Examiners of Psychologists (Board) adopts amendments to rule §465.3, Providers of Psychological Services with no changes to the proposed text published in the May 25, 2007 issue of the *Texas Register* (32 TexReg 2813) and will not be republished.

The amendments are being adopted to make grammatical and punctuation corrections in this rule.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703788
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 10, 2007
Proposal publication date: May 25, 2007
For further information, please call: (512) 305-7706

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22 TAC §465.12

The Texas State Board of Examiners of Psychologists adopts amendment to rule §465.12, Privacy and Confidentiality with no changes to the proposed text published in the May 25, 2007,

issue of the *Texas Register* (32 TexReg 2814) and will not be republished.

The amendments are being adopted to make grammatical corrections in this rule.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703789
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 10, 2007
Proposal publication date: May 25, 2007
For further information, please call: (512) 305-7706

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22 TAC §465.13

The Texas State Board of Examiners of Psychologists adopts amendment to rule §465.13, Personal Problems, Conflicts and Dual Relationships with no changes to the proposed text published in the May 25, 2007, issue of the *Texas Register* (32 TexReg 2814) and will not be republished.

The amendments are being adopted to clarify the rule.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703790
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 10, 2007
Proposal publication date: May 25, 2007
For further information, please call: (512) 305-7706

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22 TAC §465.14

The Texas State Board of Examiners of Psychologists adopts amendments to rule §465.14, Misuse of Licensees' Services with no changes to the proposed text published in the May 25, 2007, issue of the *Texas Register* (32 TexReg 2815) and will not be republished.

The amendments are being adopted to make grammatical corrections in this rule.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703791
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 10, 2007
Proposal publication date: May 25, 2007
For further information, please call: (512) 305-7706

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22 TAC §465.15

The Texas State Board of Examiners of Psychologists adopts amendment to rule §465.15, Fees and Financial Arrangements with no changes to the proposed text published in the May 25, 2007, issue of the *Texas Register* (32 TexReg 2815) and will not be republished.

The amendments are being adopted to clarify the rule.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703792
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 10, 2007
Proposal publication date: May 25, 2007
For further information, please call: (512) 305-7706

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22 TAC §465.17

The Texas State Board of Examiners of Psychologists adopts amendment to rule §465.17, Therapy and Counseling with no changes to the proposed text published in the May 25, 2007, issue of the *Texas Register* (32 TexReg 2816) and will not be republished.

The amendments are being adopted to clarify the rule and require that treatment plans be in writing.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703793
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 10, 2007
Proposal publication date: May 25, 2007
For further information, please call: (512) 305-7706

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CHAPTER 471. RENEWALS

22 TAC §471.5

The Texas State Board of Examiners of Psychologists adopts amendment to rule §471.5, Updated Information Requirements with no changes to the proposed text published in the May 25, 2007, issue of the *Texas Register* (32 TexReg 2817) and will not be republished.

The amendments are being adopted to correct grammatical errors to this rule.

The adopted amendments will help to ensure protection of the public.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 21, 2007.

TRD-200703794
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: September 10, 2007
Proposal publication date: May 25, 2007
For further information, please call: (512) 305-7706

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 130. CODE ENFORCEMENT REGISTRY

25 TAC §§130.1 - 130.18, 130.20

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), adopts the repeal of §§130.1 - 130.18 and §130.20, concerning the registration of code enforcement officers without changes to the proposal as published in the June 8, 2007, issue of the *Texas Register* (32 TexReg 3101) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The repeals are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 Texas Administrative Code (TAC) Chapter 140, Health Professions Regulation. The rules also constitute the advisory committee review required by 25 TAC §130.3(e), which is in §140.152. The new rules transfer and update existing language, and do not impose any new requirements or fees on applicants or licensees. The new rules also add four additional national code enforcement certifications previously omitted from the rules to the list of certifications acceptable for continuing education credit.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 130.1 - 130.18 and §130.20 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the depart-

ment is repealing the existing sections and adopting the rules in 25 TAC Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

The repeal of §§130.1 - 130.18 and §130.20 is necessary in order to combine the Professional Licensing and Certification Unit rules in one chapter, 25 TAC Chapter 140, Health Professions Regulation.

COMMENTS

The department, on behalf of the Health and Human Services Commission, did not receive any comments regarding the proposed repeal during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the repeal, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The adopted repeal is authorized by Occupations Code, §1952.051, which authorizes the adoption of rules regarding code enforcement officers; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the sections implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2007.

TRD-200703918
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: September 16, 2007
Proposal publication date: June 8, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 140. HEALTH PROFESSIONS REGULATION

SUBCHAPTER D. CODE ENFORCEMENT OFFICERS

25 TAC §§140.150 - 140.168

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), adopts new §§140.150 - 140.168, concerning the registration of code enforcement officers without changes to the proposed text as published in the June 8, 2007, issue of the *Texas Register* (32 TexReg 3102) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The new rules are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC Chapter 140, Health Professions Regulation. The rules also constitute the advisory committee review required by 25 TAC §130.3(e), which is located in §140.152. The new rules transfer and update existing language, and do not impose any new requirements or fees on applicants or licensees. The new rules also add four additional national code enforcement certifications previously omitted from the rules to the list of certifications acceptable for continuing education credit.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 130.1 - 130.18 and §130.20 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the department is repealing the existing sections in Chapter 130 and adopting the rules in 25 TAC Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

New §140.150 sets forth purpose and scope of the rules. New §140.151 includes definitions for terms used within the rules. New §140.152 covers the membership and operations of the advisory committee, and establishes the next review date as September 1, 2011. New §140.153 lists the fees required for application, registration, upgrade, renewal, and issuance of a duplicate certificate. New §140.154 describes application procedures. New §140.155 lists qualification for registration as a code enforcement officer or a code enforcement officer in training, including types of acceptable experience. New §140.156 lists the educational requirements for initial registration. New §140.157 sets forth information concerning the administration, content, grading, and other procedures for examination for registration. New §140.158 describes the procedures and criteria for approval or disapproval of an application by the department. New §140.159 sets forth the procedures and requirements for supervision for code enforcement officers in training. New §140.160 covers procedures for the issuance of a certificate of registration, including duplicates and name changes. New §140.161 sets forth information concerning registration renewal and late renewal, including renewal procedures for a registration on active military duty. New §140.162 lists the grounds for denial, suspension or revocation of a registration. New §140.163 sets out the guidelines and criteria on the eligibility of persons with criminal backgrounds to obtain registration. New §140.164 sets out violations, procedures concerning complaints and investigations, and actions the department may take against a person when violations have occurred. New §140.165 provides timelines for the processing of initial and renewal applications, and for refunds to be issued if the timelines are exceeded without sufficient cause. New §140.166 covers exemptions from the requirement for registration. New §140.167 details standards related to advertising by a registrant. New §140.168 sets forth continuing education requirements and includes four national code enforcement certifications previously omitted from the rules.

COMMENTS

The department, on behalf of the Health and Human Services Commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The adopted new rules are authorized by Occupations Code, §1952.051, which authorizes the adoption of rules regarding code enforcement officers; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2007.

TRD-200703919
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: September 16, 2007
Proposal publication date: June 8, 2007
For further information, please call: (512) 458-7111 x6972

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.3

The Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §145.3, concerning policy statements relating to parole release decisions by the Board of Pardons and Paroles. The amendment is adopted without change to the proposed text as published in the May 4, 2007, issue of the *Texas Register* (32 TexReg 2454). The text of the rules will not be republished.

The amended rule is adopted for the purpose of clarifying the language of the rule.

No public comment was received regarding adoption of the amendment.

The amended rule is adopted under §§508.036, 508.0441, and 508.141, Government Code. Section 508.036 provides the board with the authority to adopt rules relating to the decision-making processes used by the board and parole panels. Section 508.0441 provides the board with the authority to adopt reasonable rules as proper or necessary relating to the eligibility of an inmate for release on parole or release to mandatory supervision. Section 508.141 provides the board with the authority to consider and order release on parole.

No other statutes, articles, or codes are affected by the amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2007.

TRD-200703912
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Effective date: September 16, 2007
Proposal publication date: May 4, 2007
For further information, please call: (512) 406-5388

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37 TAC §145.15

The Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §145.15, concerning action upon review; extraordinary vote. The amendment is adopted without change to the proposed text as published in the May 4, 2007, issue of the *Texas Register* (32 TexReg 2455). The text of the rules will not be republished.

The amended rule is adopted for the purpose of clarifying the language of the rule.

No public comment was received regarding adoption of the amendment.

The amended rule is adopted under §§508.0441, 508.045, 508.046, and 508.141, Government Code. Sections 508.0441, 508.045, 508.046, and 508.141 authorize the Board to adopt reasonable rules as proper or necessary relating to the eligibility of an offender for release to parole or mandatory supervision; to act on matters of release to parole or mandatory supervision; relates to the extraordinary vote required for certain violent offenders; and to act on matters of release to parole or mandatory supervision.

No other statutes, articles, or codes are affected by the amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 2007.

TRD-200703913
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Effective date: September 16, 2007
Proposal publication date: May 4, 2007
For further information, please call: (512) 406-5388

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Medical Board

Title 22, Part 9

The Texas Medical Board proposes to review Chapter 175, §§175.1 - 175.5, concerning Fees, Penalties and Forms, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register,* the Texas Medical Board contemporaneously proposes an amendment to §175.1.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018.

TRD-200703894
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: August 24, 2007

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Texas Board of Pardons and Paroles

Title 37, Part 5

Under the 1997 General Appropriations Act, Article IX, Section 167, Review of Agency Rules, the Texas Board of Pardons and Paroles files this notice of intent to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 37, Public Safety and Corrections, Part 5, Chapter 146, relating to Revocation of Parole or Mandatory Supervision.

The Board undertakes its review pursuant to Government Code, §2001.039, Government Code. The Board will accept comments for 30 days following the publication of this notice in the *Texas Register* and will assess whether the reasons for adopting the sections under review continue to exist. Proposed changes to the rule as a result of the rule review will be published in the Proposed Rules section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption by the Board, in accordance with the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Any questions or written comments pertaining to this notice of intention to review should for the next 30-day comment period be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, TX 78701, or by e-mail to bettie.wells@tdcj.state.tx.us.

TRD-200703914
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Filed: August 27, 2007

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State Securities Board

Title 7, Part 7

The State Securities Board (Agency), beginning September 2007, will review and consider for readoption, revision, or repeal Chapters 107, Terminology; 127, Miscellaneous; and 131, Guidelines for Confidentiality of Information, in accordance with Texas Government Code, §2001.039. The rules to be reviewed are located in Title 7, Part 7, of the Texas Administrative Code.

The assessment made by the Agency at this time indicates that the reasons for readopting these chapters continue to exist.

The Agency's Board will consider, among other things, whether the reasons for adoption of these rules continue to exist and whether amendments are needed. Any changes to the rules proposed by the Agency's Board after reviewing the rules and considering the comments received in response to this notice will appear in the "Rules Proposed" section of the *Texas Register* and will be adopted in accordance with the requirements of the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001. The comment period will last for 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this notice of intention to review may be submitted in writing, within 30 days following the publication of this notice in the *Texas Register,* to David Weaver, General Counsel, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to Mr. Weaver at (512) 305-8310. Comments will be reviewed and discussed in a future Board meeting.

TRD-200703871
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Filed: August 24, 2007

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Adopted Rule Reviews

Texas Commission on Fire Protection

Title 37, Part 13

The Texas Commission on Fire Protection readopts the following chapters without changes.

Chapter 401. Practice and Procedure

Chapter 403. Criminal Convictions and Eligibility for Certification

Chapter 405. Charges for Public Records

Chapter 431. Fire Investigation

Chapter 433. Minimum Standards for Driver/Operator-Pumper

Chapter 435. Fire Fighter Safety

Chapter 437. Fees

Chapter 443. Certification Curriculum Manual

Chapter 445. Administrative Inspections and Penalties

Chapter 447. Part-Time Fire Protection Employee

Chapter 449. Head of a Fire Department

Chapter 461. General Administration

Chapter 463. Application Criteria

Chapter 465. Equipment, Facilities, and Training Standards

In accordance with Texas Government Code, §2001.039, added by Acts 1999, 76th Legislative, §1499, Article 1, §1.11. The proposed rule review was published in the May 4, 2007, issue of the *Texas Register* (32 TexReg 2483).

The Texas Commission on Fire Protection finds that the reasons for adopting these rules continue to exist.

TRD-200703844
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Filed: August 23, 2007

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Texas Lottery Commission

Title 16, Part 9

The Texas Lottery Commission (Commission) has reviewed 16 TAC Chapter 403 relating to General Administration, in accordance with the requirements of Texas Government Code, §2001.039, and re-adopts the rules in Chapter 403, other than §403.402, relating to Exemption from Vehicle Inscription Requirements. The Commission has determined that the reasons continue to exist for adopting the rules in Chapter 403, other than §403.402. The Commission will propose the repeal of §403.402 in a separate rulemaking.

Section 403.101 sets out agency procedures for Commission compliance with Government Code Chapter 552.

Section 403.110 complies with Government Code §2001.021.

Sections 403.201 - 403.223 comply with Government Code §2260.052.

Section 403.301 complies with Government Code §2161.003.

Section 403.401 complies with Government Code §2171.1045.

This review and re-adoption has been conducted in accordance with Texas Government Code, §2001.039. The Commission received no comments on the proposed review, which was published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4244).

This concludes the review of 16 TAC Chapter 403.

TRD-200703879
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 24, 2007

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Texas Board of Pardons and Paroles

Title 37, Part 5

The Texas Board of Pardons and Paroles files this notice of readoption of 37 TAC Chapter 145 (Parole) Subchapter A (Parole Process). The Board amended Rules §145.3 and §145.15 to clarify the language of the text. The readoption of Chapter 145 is filed in accordance with the Board of Pardons and Paroles' Notice of Intent to Review published in the May 4, 2007 issue of the *Texas Register* (32 TexReg 2483). No public comments were received.

The assessment of Chapter 145 indicates that the original justification for the rules continues to exist, and the Board is readopting the rules in accordance with Texas Government Code, §2001.039. This concludes the review of 37 TAC Chapter 145.

TRD-200703911
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Filed: August 27, 2007

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §60.121(k)

Noncompliance Event	Uncorrected Points	Corrected Points	Programs	If HTC, on Form 8823?
Major property condition violations	Material Noncompliance	10	HTC Bonds HOME HTF CDBG	Yes
Pattern of minor property condition violations	10	5	HTC Bonds HOME HTF CDBG	Yes
Administrative reporting of property condition violations	0	0	HTC Bonds HOME HTF CDBG	Yes
Owner refused to lease to a holder of rental assistance certificate/voucher because of the status of the prospective tenant as such a holder	Material Noncompliance	10	See §60.112	Yes
Owner failed to approve and distribute an Affirmative Marketing Plan as required under §60.112 of this chapter	3	1	See §60.112	No
Development failed to comply with requirements limiting minimum income standards for Section 8 residents.	10	3	See §60.112	No
Development is not available to general public	10	0	HTC	Yes
HUD or DOJ notification of possible Fair Housing Act violation	0	0	HTC	Yes
Determination of a violation under the Fair Housing Act	Material Noncompliance	10	All programs	Yes
Development is out of compliance and never expected to comply/ Foreclosure	Material Noncompliance	NA/ No correction possible	All program	Yes
Owner did not allow on-site monitoring review	Material Noncompliance	5	All programs	Yes
LURA not in effect	Material Noncompliance	5	All programs	Yes
Development failed to meet minimum set aside	20	10	HTC Bonds	Yes
No evidence of, or failure to certify to, material participation of a non-profit, if required by the Land Use Restriction Agreement	10	3	HTC	Yes
Development failed to meet additional State required rent and occupancy restrictions	10	3	HTC Home HTF Bonds	No
The Development failed to provide required supportive services as promised at Application	10	3	HTC Bonds	No

The Development failed to provide housing to the elderly as promised at Application	10	3	HTC Bonds HOME HTF CDBG	No
Failure to provide special needs housing	10	3	HTC Bonds HOME HTF CDBG	No
Changes in Eligible Basis or Applicable Percentage	3	NA, No correction possible	HTC	Yes
Failure to submit part or all of the AOCR or failure to submit any other annual, monthly, or quarterly report required by the Department	10	3	All programs	Yes
Utility Allowance not calculated properly	20	5	HTC Bonds HOME HTF CDBG	Yes
Failure to comply with the Next Available Qualifying Unit Rule	3	1	AHP	Na
Owner failed to execute required lease provisions, including language required by §60.110 or exclude prohibited lease language	3	1	HTC HOME	No
Failure to provide annual Housing Quality Standards inspection	10	3	HOME	NA
Development has failed to establish and maintain a reserve account in accordance with §1.37 of this title	Material Noncompliance	10	HTC	No
Development substantially changed the scope of services as presented at initial Application without prior Department approval	4	0	HTC	No
Change in ownership or General Partner without proper notification to and approval of Department	4	0	All programs	No
Failure to provide a notary public as promised at Application	5	1	HTC	No
Violations of the Unit Vacancy Rule	3	1	HTC	Yes
Casualty loss	0	0	All programs	Yes

Figure: 10 TAC §60.121(l)

Noncompliance Event	Uncorrected Points	Corrected Points	Programs	If HTC, on form 8823?
Unit not leased to Low Income Household	5	1	All programs	Yes
Low Income Units occupied by nonqualified full-time students	3	1	HTC during the compliance period Bond	Yes
Low Income Units used on transient basis	3	1	HTC Bond	Yes
Household income increased above the re-certification limit and an available Unit was rented to a market tenant	3	1	HTC During the compliance period Bonds HOME HTF AHP	Yes
Gross rent exceeds the highest rent allowed under the LURA or other deed restriction	5	1	All programs	Yes
Failure to maintain or provide tenant income certification and documentation	3	1	All programs	Yes
Unit not available for rent	3	1	All programs	Yes
Qualifying Unit designation removed from household	3	1	AHP	NA
Development evicted or terminated the tenancy of a low income tenant for other than good cause	10	3	HTC HOME	Yes
Household income increased above 80% at recertification and owner failed to properly determine rent	3	1	HOME	NA

Figure: 10 TAC §60.309(a)(4)

Non-Performance Contract Action	Required Action to Adequately Perform	Potential Penalties for Non-Performance
Failure to correct audit finding	Satisfactorily answer audit finding during timeline provided	Request repayment of funds; limitation of future payments; reduction in administrative fees allowed; implementation of §1.3 of this title; termination of current contract; bar of future contracts; added to debarment list.
Failure to file required audit report	File audit report prior to deadline	Loss of contract; withholding of payments, implementation of §1.3 of this title; bar of future contracts.
Failure to meet contract milestones	Development of corrective action and contract amendment	Reduction in administrative fees; termination of contract; withholding of funds requested.
Failure to submit necessary Documentation	Submit required documents within 30 days of notification	Department will return faulty submission documents; reduction of administrative fees; withholding of payments; termination of contract; if not submitted bar of future contracts.
Failure to timely request amendment	Request amendment prior to contract expiration in writing and signed by contract signatory authority made at least 90 days before contract end	Termination of contract; withholding of funds requested; reduction in administrative fees; audit finding; repayment of funds paid for work not under contract.
Misappropriation of funds	Repayment of funds	Withholding of funds; criminal referral to District attorney; referral to Attorney General for legal action; termination of contract; inclusion in debarment list.
Loss or removal of Federal Programs from subrecipient	Explanation of reason for loss of program and clearance to continue to receive other funds	Termination of contract; withholding of funds requested; inclusion in debarment list.
Failure to execute contract	Execution of contract with 30 days of notice	Removal from contract administration system; termination of contract; withholding of any requested funds.
Disallowed costs	Clearance of costs prior to deadline provided	Request of repayment of funds; withholding of funds; audit finding; implementation of §1.3 of this title.
Failure to provide services contracted	Design corrective action plan and submit for approval	Request repayment of funds; withholding of requested funds; disallowed costs; audit findings; legal action to enforce contract under specific performance; termination of contract; reduction in administrative fees.
Match not submitted in time or in a pro-rata share or insufficient documentation	Submit according to requirements or request amendment	Withholding of request funds; reduction of points on future applications; bar placed on contract monitoring system; limiting payments until pro-rata match is achieved; reduce administrative fees.
Failure to request draw within required time	Must submit within the sixty day time frame or request an extension with sufficient justification as to the delay	Allow contract to expire in contract system without issuing payment; close out contract as completed; withholding of requested funds; reduction of administrative fees
Criminal charges filed against key staff	Report and explanation of charges and duties of charged staff	Audit of program related to charged staff; termination of contract; request for development of action plan for correction.
Failure to respond to Department Correspondence	Respond with appropriate response prior to deadline provided not to exceed 30 days	Termination of contract; request for repayment of fees; withholding of requested funds; referral to Attorney General for enforcement; inclusion in debarment list.

Figure: 30 TAC §336.1133

Constituent or Property	Maximum (mg/l)	Concentration (pCi/l)
Arsenic	0.05	
Barium	1	
Cadmium	0.01	
Chromium	0.05	
Lead	0.05	
Mercury	0.002	
Selenium	0.01	
Silver	0.05	
Endrin 1,2,3,4,10,10-hexachloro-6, 7-expoxy-1,4,4a,5,6,7,8, 8a-octahydro-endo, endo-1,4:5,8-dimethanonaphthalene	0.0002	
Lindane 1,2,3,4,5, 6-hexachlorocyclohexane	0.004	
Methoxychlor 1,1,1-trichloro-2,2-bis-(p-methoxyphenyl) ethane	0.1	
Toxaphene Chlorinated camphene	0.005	
2,4-D (2,4, 5-Trichlorophenoxy) acetic acid	0.1	
Silvex 2-(2,4,5-Trichlorophenoxy) propionic acid	0.01	
Combined radium-226 and radium-228		5
Gross alpha-particle activity (excluding radon and uranium when producing uranium by-product material or radon and thorium when producing thorium by-product material)		15

Figure: 30 TAC §336.1207(a)

	Category I	Category II	Category III	Category IV
Class I Storage or Processing Facility	10 mCi	100 mCi	1 Ci	10 Ci
Class II Storage Facility	2 Ci	20 Ci	200 Ci	2000 Ci
Class II Processing Facility	1 Ci	10 Ci	100 Ci	1000 Ci

Figure: 30 TAC §336.1231(a)

Element*	Radionuclide**	Category
Actinium (89)	Ac-227	I
	Ac-228	I
Americium (95)	Am-241	I
	Am-243	I
Antimony (51)	Sb-122	IV
	Sb-124	III
	Sb-125	III
Argon (18)	Ar-37	VI
	Ar-41	II
	Ar-41 (uncompressed)†	V
Arsenic (33)	As-73	IV
	As-74	IV
	As-76	IV
	As-77	IV
Astatine (85)	Ar-211	III
Barium (56)	Ba-131	IV
	Ba-133	II
	Ba-140	III
Berkelium (97)	Bk-249	I
Beryllium (4)	Be-7	IV
Bismuth (83)	Bi-206	IV
	Bi-207	III
	Bi-210	II
	Bi-212	III
Bromine (35)	Br-82	IV
Cadmium (48)	Cd-109	IV
	Cd-115m	III
	Cd-115	IV
Calcium (20)	Ca-45	IV
	Ca-47	IV
Californium (98)	Cf-249	I
	Cf-250	I
	Cf-252	I
Carbon (6)	C-14	IV
Cerium (58)	Ce-141	IV
	Ce-143	IV
	Ce-144	III
Cesium (55)	Cs-131	IV
	Cs-134m	III
	Cs-134	III

Element*	Radionuclide**	Category
	Cs-135	IV
	Cs-136	IV
	Cs-137	III
Chlorine (17)	Cl-36	III
	Cl-38	IV
Chromium (24)	Cr-51	IV
	Co-56	III
	Co-57	IV
Cobalt (27)	Co-58m	IV
	Co-58	IV
	Co-60	III
Copper (29)	Cu-64	IV
	Cm-242	I
	Cm-243	I
Curium (96)	Cm-244	I
	Cm-245	I
	Cm-246	I
	Dy-154	III
Dysprosium (66)	Dy-165	IV
	Dy-166	IV
Erbium (68)	Er-169	IV
	Er-171	IV
	Eu-150	III
	Eu-152m	IV
Europium (63)	Eu-152	III
	Eu-154	II
	Eu-155	IV
Florine (9)	F-18	IV
Gadolinium (64)	Gd-153	IV
	Gd-159	IV
Galium (31)	Ga-67	III
	Ga-72	IV
Germanium (32)	Ge-71	IV
	Au-193	III
	Au-194	III
Gold (79)	Au-195	III
	Au-196	IV
	Au-198	IV
	Au-199	IV
Hafnium (72)	Hf-181	IV
Holmium (67)	Ho-166	IV
Hydrogen (1)	H-3 (see tritium)	

Element*	Radionuclide**	Category
Indium (49)	In-113m	IV
	In-114m	III
	In-115m	IV
	In-115	IV
Iodine (53)	I-124	III
	I-125	III
	I-126	III
	I-129	III
	I-131	III
	I-132	IV
	I-133	III
	I-134	IV
	I-135	IV
Iridium (77)	Ir-190	IV
	Ir-192	III
	Ir-194	IV
Iron (26)	Fe-55	IV
	Fe-59	IV
Krypton (36)	Kr-85m	III
	Kr-85m (uncompresssed)†	V
	Kr-85	III
	Kr-85 (uncompressed)†	VI
	Kr-87	II
	Kr-87 (uncompressed)†	V
Lanthanum (57)	La-140	IV
Lead (82)	Pb-203	IV
	Pb-210	II
	Pb-212	II
Lutetium (71)	Lu-172	III
	Lu-177	IV
Magnesium (12)	Mg-28	III
Manganese (25)	Mn-52	IV
	Mn-54	IV
	Mn-56	IV
Mercury (80)	Hg-197m	IV
	Hg-197	IV
	Hg-203	IV
Mixed fission products (MFP)		II
Molybdenum (42)	Mo-99	IV
Neodymium (60)	Nd-147	IV
	Nd-149	IV

Element*	Radionuclide**	Category
Neptunium (93)	Np-237	I
	Np-239	I
Nickel (28)	Ni-56	III
	Ni-59	IV
	Ni-63	IV
	Ni-65	IV
Niobium (41)	Nb-93m	IV
	Nb-95	IV
	Nb-97	IV
Osmium (76)	Os-185	IV
	Os-191m	IV
	Os-191	IV
	Os-193	IV
Palladium (46)	Pd-103	IV
	Pd-109	IV
Phosphorus (15)	P-32	IV
Platinum (73)	Pt-191	IV
	Pt-193	IV
	Pt-193m	IV
	Pt-197m	IV
	Pt-197	IV
Plutonium (94)	Pu-238 F	I
	Pu-239 F	I
	Pu-240	I
	Pu-241 F	I
	Pu-242	I
Polonium (84)	Po-210	I
Potassium (19)	K-42	IV
	K-43	III
Praseodymium (59)	Pr-142	IV
	Pr-143	IV
Promethium (61)	Pm-147	IV
	Pm-149	IV
Protactinium (91)	Pa-230	I
	Pa-231	I
	Pa-233	II
Radium (88)	Ra-223	II
	Ra-224	II
	Ra-226	I
	Ra-228	I
Radon (86)	Rn-220	IV
	Rn-222	II

Element*	Radionuclide**	Category
Rhenium (75)	Re-183	IV
	Re-186	IV
	Re-187	IV
	Re-188	IV
	Re-Natural	IV
Rhodium (45)	Rh-103m	IV
	Rh-105	IV
Rubidium (37)	Rb-86	IV
	Rb-87	IV
	Rb-Natural	IV
Ruthenium (44)	Ru-97	IV
	Ru-103	IV
	Ru-105	IV
	Ru-106	III
Samarium (62)	Sm-145	III
	Sm-147	III
	Sm-151	IV
	Sm-153	IV
Scandium (21)	Sc-46	III
	Sc-47	IV
	Sc-48	IV
Selenium (34)	Se-75	IV
Silicon (14)	Si-31	IV
Silver (47)	Ag-105	IV
	Ag-110m	III
	Ag-111	IV
Sodium (11)	Na-22	III
	Na-24	IV
Strontium (38)	Sr-85m	IV
	Sr-85	IV
	Sr-89	III
	Sr-90	II
	Sr-91	III
	Sr-92	IV
Sulfur (16)	S-35	IV
Tantalum (73)	Ta-182	III
Technetium (43)	Tc-96m	IV
	Tc-96	IV
	Tc-97m	IV
	Tc-97	IV
	Tc-99m	IV
	Tc-99	IV

Element*	Radionuclide**	Category
	Te-125m	IV
	Te-127m	IV
	Te-127	IV
Tellurium (52)	Te-129m	III
	Te-129	IV
	Te-131m	III
	Te-132	IV
Terbium (65)	Tb-160	III
	Tl-200	IV
Thallium (81)	Tl-201	IV
	Tl-202	IV
	Tl-204	III
	Th-227	II
	Th-228	I
	Th-230	I
Thorium (90)	Th-231	I
	Th-232	III
	Th-234	II
	Th-Natural	III
	Tm-168	III
Thulium (69)	Tm-170	III
	Tm-171	IV
	Sn-113	IV
Tin (50)	Sn-117m	III
	Sn-121	III
	Sn-125	IV
	H-3	
Tritium (1)	H-3 (as a gas, as luminous paint, or adsorbed on solid material.)	IV VII
	W-181	IV
Tungsten (74)	W-185	IV
	W-187	IV
	U-230	II
	U-232	I
	U-233 F	II
	U-234	II
Uranium (92)	U-235 F	III
	U-236	II
	U-238	III
	U-Natural	III
	U-Enriched F	III
	U-Depleted	III
Vanadium (23)	V-48	IV

Element*	Radionuclide**	Category
	V-49	III
Xenon (54)	Xe-125	III
	Xe-131m	III
	Xe-131m (uncompressed)†	V
	Xe-133	III
	Xe-133 (uncompressed)†	VI
	Xe-135	II
	Xe-135 (uncompressed)†	V
Ytterbium (70)	Yb-175	IV
Yttrium (39)	Y-88	III
	Y-90	IV
	Y-91m	III
	Y-91	III
	Y-92	IV
	Y-93	IV
Zinc (30)	Zn-65	IV
	Zn-69m	IV
	Zn-69	IV
Zirconium (40)	Zr-93	IV
	Zr-95	III
	Zr-97	IV

NOTE: For mixtures of radionuclides and for radionuclides not included in this subsection, see subsection (b) of this section, waste processing and storage categories.

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* Atomic number shown in parentheses.
** Atomic mass number shown after the element symbol.
F Fissile material.
m Metastable state.
† Uncompressed means at a pressure not exceeding 1 atmosphere.

Figure: 30 TAC §336.1231(b)

	RADIOACTIVE HALF-LIFE		
Radionuclide	0 to 1000 days	1000 days to 10^6 years	Over 10^6 years
Atomic No. 1-81	Category III	Category II	Category III
Atomic No. 82 and over	Category I	Category I	Category III

Figure: 43 TAC §21.441(b)(2)(C)

Wind Load Pressure in Pounds per Square Foot

Height, in feet above ground, as measured above the average level of the ground adjacent to the structure	Pressure, pounds per square foot
0 - 5	0
6 - 30	20
31 - 50	25
51 - 99	35
100 - 199	45
200 - 299	50
300 - 399	55
400 - 500	60
501 - 800	70
Over 800	77

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

Notice of Public Hearing Regarding the Issuance of Bonds

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") at 12:00 p.m. on September 24, 2007 at 1005 Congress Avenue, Suite 500 (Conference Room), Austin, Texas 78701, on the proposed issuance by the Issuer of one or more series of revenue bonds (the "Bonds") to provide financing for the acquisition of single family mortgages in the State of Texas, pursuant to: (i) its professional educators home loan program (the "Professional Educators Project"); (ii) its fire fighter, law enforcement or security officer, and emergency medical services personnel home loan program (the "Fire Fighter, Law Enforcement or Security Officer, and Emergency Medical Services Personnel Project"); and (iii) its low income home loan program (the "Low Income Project"). The maximum aggregate face amount of the Bonds to be issued with respect to the Professional Educators Project is $50,000,000; the maximum aggregate face amount of the Bonds to be issued with respect to the Fire Fighter, Law Enforcement or Security Officer, and Emergency Medical Services Personnel Project is $50,000,000; and the maximum aggregate face amount of the Bonds to be issued with respect to the Low Income Project is $25,000,000. All interested persons are invited to attend the public hearing to express orally, or in writing, their views on the Professional Educators Project; the Fire Fighter, Law Enforcement or Security Officer, and Emergency Medical Services Personnel Project; the Low Income Project; and the issuance of the Bonds. The Bonds shall not constitute or create an indebtedness, general or specific, or liability of the State of Texas, or any political subdivision thereof. The Bonds shall never constitute or create a charge against the credit or taxing power of the State of Texas, or any political subdivision thereof. Neither the State of Texas nor any political subdivision thereof shall in any manner be liable for the payment of the principal of or interest on the Bonds or for the performance of any agreement or pledge of any kind which may be undertaken by the Issuer and no breach by the Issuer of any agreements will create any obligation upon the State of Texas, or any political subdivision thereof. Further information with respect to the proposed Bonds will be available at the hearing or upon written request prior thereto addressed to David Long at the Texas State Affordable Housing Corporation, 1005 Congress Avenue, Suite 500, Austin, Texas 78701; 1-888-638-3555, ext. 402.

Individuals who require auxiliary aids in order to attend this meeting should contact Laura Ross, ADA Responsible Employee, at 1-888-638-3555, ext. 400 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to David Long at dlong@tsahc.org.

TRD-200703943
David Long
President
Texas State Affordable Housing Corporation
Filed: August 28, 2007

♦ ♦ ♦

Texas Department of Agriculture

Request for Applications: Texans Feeding Texans: Home-Delivered Meal Grant Program

In accordance with Texas Agriculture Code, §12.042, as enacted by House Bill 407, and House Bill 1, 80th Legislature, Regular Session 2007, the state legislature has appropriated funding to the Texas Department of Agriculture (TDA) for distribution, pursuant to the Texans Feeding Texans: Home-Delivered Meal Grant Program (HDMGP), to governmental agencies or qualifying non-profit organizations that deliver meals to homebound persons that are elderly and/or have a disability. TDA will begin accepting applications from eligible organizations September 11, 2007.

Eligibility Criteria. To be eligible for HDMGP funds an applying organization must meet the following criteria:

1. Must be a governmental agency or a nonprofit private organization that is exempt from taxation under Section 501(a), Internal Revenue Code of 1986, as an organization described by Section 501(c)(3) of that code, that is a direct provider of home-delivered meals to the elderly or persons with disabilities in this state;

2. If a nonprofit private organization, must have a volunteer board of directors;

3. Must practice nondiscrimination;

4. Must have an accounting system or fiscal agent approved by the county in which it provides meals;

5. Must have a system to prevent the duplication of services to the organization's clients;

6. Must agree to use funds received under this section only to supplement and extend existing services related directly to home-delivered meal services;

7. Must have received a grant from the county in which the organization provides meals; and

8. Must submit a grant application on the application form provided by TDA; and

9. Must comply with HDMGP rules adopted by TDA (4 TAC 1.950 - 1.962).

For purposes of this Grant Program, "Homebound" means a person who is unable to leave his or her residence without aid or assistance or whose ability to travel from his or her residence is substantially impaired; "Elderly" means an individual who is 60 years of age or older; and "Disability" means a physical, mental or developmental impairment, temporarily or permanently limiting an individuals capacity to adequately perform one or more essential activities of daily living, which include, but are not limited to, personal and health care, moving around, communicating and housekeeping.

Submitting an Application. Applications will be accepted beginning September 11, 2007, and must be submitted on the form provided by TDA. Application forms will be available September 10, 2007, on TDA's website at: www.tda.state.tx.us or available upon

request from TDA by calling (512) 475-1615. Applications must be mailed to TDA headquarters in Austin by the deadline provided below. Applications must be certified by the applicant, include required supporting documentation, be notarized, and be signed by the organization's executive director and board chair, if applicable. An organization must submit a separate application for each county in which it provides home-delivered meal services.

Deadline for Submission of Applications. The postmark deadline for mailing of applications to TDA is

November 1, 2007.

TDA will distribute funds after all valid applications are processed. Funds must be distributed by February 1, 2008. In the event that the amount qualifying grants exceeds the amount of funds available, funds may be distributed on a pro rata basis.

Grant Agreement. Eligible organizations that qualify to receive grant funds must execute a Grant Agreement with TDA, prior to the disbursement of any grant funds.

Further Information. Additional information about the HDMGP, the application process and program rules can be found on TDA's website: www.tda.state.tx.us. In addition, organizations may contact Catherine Wright Steele, State Legislative Liaison, TDA at (512) 463-7700 or catherine.wright-steele@tda.state.tx.us, for more information.

TRD-200703970
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: August 29, 2007

♦ ♦ ♦

Brazos Valley Council of Governments

Request for Proposals for Ryan White Part B, HIV Health and Social Services (State Services), and Housing Opportunities for Persons with AIDS (HOPWA)

On August 31, 2007, the Brazos Valley Council of Governments will release a Request for Proposals (RFP) for Ryan White Part B, HIV Health and Social Services (State Services), and Housing Opportunities for Persons with AIDS (HOPWA) funds to contract for the initial contract year of 2008-2009. Proposals are requested from eligible entities in the Central Texas HIV Administrative Service Area to provide health and social services to eligible persons living with HIV/AIDS. Eligible applicants must be public or private nonprofit health care or social services organizations doing business within one of the five HIV Service Delivery Areas (HSDAs): Austin, Bryan/College Station, San Angelo, Temple/Killeen, and Waco.

A complete set of specifications and documents is available for download at http://hiv.bvcog.org or by calling (979) 595-2830.

A letter of intent should be submitted by September 14, 2007. A Pre-Proposal Conference on completion of the proposal will be held on October 3, 2007 at 10:00 a.m. The meeting will be held at the Brazos Valley Council of Governments (3991 East 29th Street, Bryan, Texas 77802) in the Board Room. Attendance at the conference is not mandatory, but is strongly encouraged. To be considered, proposals must be received no later than 4:00 p.m. on October 26, 2007.

TRD-200703910
Tom Wilkinson
Executive Director
Brazos Valley Council of Governments
Filed: August 27, 2007

♦ ♦ ♦

City of El Paso

Deposit of Firemen and Policemen Pension Fund

The City of El Paso's City Manager, Joyce Wilson, certifies that, on July 30, 2007, the City of El Paso deposited $100,000,000 (one hundred million dollars) to the account of the El Paso Firemen and Policemen Pension Fund in accordance with an agreement between the City of El Paso and the El Paso Firemen and Policemen's Pension Fund in pursuant to House Bill 3355, 2007.

TRD-200703947
Joyce Wilson
City Manager
City of El Paso
Filed: August 28, 2007

♦ ♦ ♦

Comptroller of Public Accounts

Notice of Intent to Renew Contract

The Comptroller of Public Accounts (Comptroller) announces this renewal of a contract for outbound mailing services. The Comptroller announces that the contract is renewed with PrintMPro, Ltd., Successor in Interest to NPSI, Ltd., 2500 McHale Court, Suite 100, Austin, Texas 78758.

The total amount of the contract is dependent on the Comptroller's mail volume and use of outbound mailing services at the rates set out in the contract. The original term of the contract was June 15, 2005 through August 31, 2006. The extended term of the renewed contract is September 1, 2007 through August 31, 2008.

The notice of request for proposals (RFP #172d) was originally issued on March 28, 2005.

TRD-200703930
Pamela G. Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: August 28, 2007

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, 303.008, 303.009, 304.003, and 346.101, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/03/07 - 09/09/07 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/03/07 - 09/09/07 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009[3]for the period of 08/01/07 - 08/31/07 is 18% for Consumer/Agricultural/Commercial credit through $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009 for the period of 08/01/07 - 08/31/07 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 10/01/07 - 12/31/07 is 18% for Consumer/Agricultural/Commercial credit through $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 10/01/07 - 12/31/07 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by §303.009[1] for the period of 10/01/07 - 12/31/07 is 18% for Consumer/Agricultural/Commercial credit through $250,000.

The lender credit card quarterly rate as prescribed by §346.101, Texas Finance Code[1] for the period of 10/01/07 - 12/31/07 is 18% for Consumer/Agricultural/Commercial credit through $250,000.

The standard annual rate as prescribed by §303.008 and §303.009[4] for the period of 10/01/07 - 12/31/07 is 18% for Consumer/Agricultural/Commercial credit through $250,000.

The standard annual rate as prescribed by §303.008 and §303.009 for the period of 10/01/07 - 12/31/07 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by §303.009[1] for the period of 10/01/07 - 12/31/07 is 18% for Consumer/Agricultural/Commercial credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 09/01/07 - 09/30/07 is 8.25% for Consumer/Agricultural/Commercial credit through $250,000.

The judgment ceiling as prescribed §304.003 for the period of 09/01/07 - 09/30/07 is 8.25% for Commercial over $250,000.

[1]Credit for personal, family, or household use.

[2]Credit for business, commercial, investment, or other similar purpose.

[3]For variable rate commercial transactions only.

[4]Only for open-end credit as defined in §301.002(14), Texas Finance Code.

TRD-200703942
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 28, 2007

♦ ♦ ♦

Texas Education Agency

Notice of Correction: Request for Applications Concerning Early College High School Grant, Cycle 2

The Texas Education Agency (TEA) published Request for Applications (RFA) #701-07-121 Concerning the Early College High School Grant, Cycle 2, in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5783).

The TEA is amending the starting date of the project. Applicants should plan for a starting date of no earlier than February 1, 2008. This correction reflects a change from the original starting date of March 1, 2008.

The TEA is also amending the program description to define an Early College High School (ECHS) as serving students in Grades 9-12. This correction reflects a change from the original description that defined an ECHS as serving students in either Grades 9-12 or Grades 6-12.

The TEA is also amending the approximate project funding amounts available. A project will receive a maximum of $125,000 to plan an ECHS serving Grades 9-12. In the second and third years of the grant, projects will receive a maximum amount of $200,000 per year. These corrections reflect changes from the following original maximum amounts: $120,000 for the planning year; $120,000 for an ECHS serving Grades 9-12 or $140,000 for an ECHS serving Grades 6-12 for the second year; and $240,000 for and ECHS serving Grades 9-12 or $280,000 for an ECHS serving Grades 6-12 for the third year.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, TEA, (512) 463-9269, or Dale Fowler, Division of Education Initiatives, TEA, (512) 936-6060.

TRD-200703973
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: August 29, 2007

♦ ♦ ♦

Request for Applications Concerning Texas High School Redesign and Restructuring Grant, Cycle 4

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-07-123 from eligible school districts or open-enrollment charter schools. A school district or open-enrollment charter school in Texas is eligible to apply for the Texas High School Redesign and Restructuring Grant, Cycle 4, if the school district or open-enrollment charter school includes a high school campus that has been rated *Academically Unacceptable* under the 2007 state accountability rating system. The final rating must be issued under standard accountability procedures and may not be issued under alternative education accountability procedures. A high school that is eligible to participate in the Texas High School Redesign and Restructuring Grant, Cycle 4, shall (1) serve students in two or more of the following grades: 9, 10, 11, or 12; (2) be a school with at least 50 percent of its student population in Grade 9 or higher; and (3) serve at least 100 students in Grades 9-12.

The following eligibility requirements also apply. (1) A district or open-enrollment charter school applying for this grant must be financially stable as determined by the Division of Financial Audits at TEA. This determination will be made based upon financial and other information disclosed in the audit or compilation report. Financial stability will be considered before issuing a grant award and is a precondition for a competitive award. (2) An open-enrollment charter high school campus shall become ineligible for grant funding (or if a campus has applied for and received funding for this grant, will have its grant funding placed on hold) if the commissioner of education notifies the campus' charter holder of the commissioner's intent to revoke or non-renew such charter under the Texas Education Code (TEC), Chapter 12, or close the campus under TEC, Chapter 39, for any of the reasons set forth in either statutory provision. If the commissioner of education ultimately revokes or denies renewal of an open-enrollment charter of a charter holder or closes a campus that has been awarded funds under this grant program, grant funding shall be discontinued.

A district or open-enrollment charter school may not submit an application if more than three high school campuses within the district or 33 percent of the high school campuses within the district, whichever is greater, have been awarded any of the following grants: a TEA Texas High School Redesign and Restructuring Grant, Cycle 1, 2, or 3; a Communities Foundation of Texas (CFT) Redesigned High School Grant; a TEA or CFT Early College High School Grant; a TEA or CFT Texas Science, Technology, Engineering, and Math (T-STEM) Academy Grant; or a Bill and Melinda Gates Foundation Redesign Grant.

To maintain eligibility for this grant, both the school district or the open-enrollment charter school, and the campus under the school district or open-enrollment charter school, must be in compliance with all accountability and performance-based monitoring intervention requirements as established by the TEA Division of Program Monitoring and Interventions.

Description. The purpose of the Texas High School Redesign and Restructuring Grant, Cycle 4, is to provide high school campuses rated *Academically Unacceptable* under the standard accountability procedures of the state accountability rating system with the resources to build capacity for implementing innovative, schoolwide initiatives designed to improve student performance on the campus. Additionally, this grant seeks to create a demonstration project that will provide case studies and models for successful practices in turning around low-performing high schools. The primary goals of this grant program are to (1) correct the specific area(s) of unacceptable performance identified in the final campus accountability data tables; (2) increase overall student achievement; (3) create a culture of high academic standards and expectations for all students; (4) demonstrate innovative management, personalization, and instructional practices; (5) ensure that every student is taught by highly qualified, effective teachers; (6) develop leadership capacity in campus and district leaders to support redesign of the campus; and (7) engage parents and the community in school activities.

Technical Assistance. Through the Region 13 Education Service Center (ESC), the TEA will provide pre-grant support and guidance in the development of individualized campus redesign plans that address both campus needs and grant requirements. The RFA will specify the time and date for the pre-grant support and guidance sessions. Through the Region 13 ESC, the TEA will also provide direct on-site coaching and required training and on-going regional training and networking activities to those high school campuses that receive the Texas High School Redesign and Restructuring Grant, Cycle 4.

Dates of Project. The Texas High School Redesign and Restructuring Grant, Cycle 4, will be implemented during the 2007-2008, 2008-2009, and 2009-2010 school years. Applicants should plan for a starting date of no earlier than March 1, 2008, and an ending date of no later than February 28, 2010.

Project Amount. A total of approximately $4 million is available for funding the Texas High School Redesign and Restructuring Grant, Cycle 4. Each high school campus will receive a maximum of $300,000 or $900 per student enrolled on the campus, whichever is the lesser amount, for the 2007-2008 through 2009-2010 project period. This project is funded 100 percent from Rider 53 general revenue funds appropriated by the state legislature.

Selection Criteria. Applications will be selected based on expert reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. From the highest ranking applications, the TEA will select applicants to participate in interview sessions with a review panel in Austin, Texas. Applicants will be required to participate in the interview process to be eligible for funding. Final grant selections will be based on the reviewers' assessment of the grant application and the oral interview.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of RFA #701-07-123 may be obtained by writing the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and telephone number including area code. The announcement letter and complete RFA will also be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, TEA, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Thursday, November 1, 2007, to be considered for funding.

TRD-200703972
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: August 29, 2007

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 8, 2007**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 8, 2007**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Air Liquide Large Industries U.S. LP; DOCKET NUMBER: 2007-0791-IWD-E; IDENTIFIER: RN102286234; LOCATION: Freeport, Brazoria County, Texas; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 Texas Administrative Code (TAC) §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0001954000, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permit effluent limits; PENALTY: $8,250; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Atmos Energy Corporation; DOCKET NUMBER: 2007-0793-AIR-E; IDENTIFIER: RN100542661; LOCATION: Henrietta, Clay County, Texas; TYPE OF FACILITY: natural gas storage station; RULE VIOLATED: 30 TAC §122.145(2)(A), General Operating Permit Number 514, Condition (b)(2), and THSC, §382.085(b), by failing to submit a semiannual deviation report; and 30 TAC §122.146(5)(C), General Operating Number 514, Condition (b)(2), and THSC, §382.085(b), by failing to submit a complete annual compliance certification; PENALTY: $2,392; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(3) COMPANY: Big Tex Trailer Manufacturing, Inc.; DOCKET NUMBER: 2007-1005-AIR-E; IDENTIFIER: RN102565868; LOCATION: Odessa, Midland County, Texas; TYPE OF FACILITY: spray coating operation; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain a permit; PENALTY: $12,000; ENFORCEMENT COORDINATOR: Jessica Rhodes, (512) 239-2879; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(4) COMPANY: Cerrito Gas Processing, L.L.C.; DOCKET NUMBER: 2006-2161-AIR-E; IDENTIFIER: RN102521150; LOCATION: Webb County, Texas; TYPE OF FACILITY: regenerative amine treating plant; RULE VIOLATED: 30 TAC §106.6(b) and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to notify the agency within 24 hours of the discovery of emissions events; and 30 TAC §106.512(2)(C)(iii) and THSC, §382.085(b), by failing to conduct the initial testing for nitrogen oxides and carbon monoxide emissions; PENALTY: $128,043; ENFORCEMENT COORDINATOR: Jessica Rhodes, (512) 239-2879; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(5) COMPANY: Charley's Concrete Co., Ltd.; DOCKET NUMBER: 2007-0807-IWD-E; IDENTIFIER: RN102776549; LOCATION: Decatur, Wise County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), General Permit Number TXG2110354, Part III, Permit Requirements, and the Code, §26.121(a), by failing to comply with the daily maximum permitted limit of 65 milligrams per liter for total suspended solids (TSS); and 30 TAC §305.125(1), General Permit Number TXG110354, Whole Effluent Toxicity Testing, and the Code, §26.121(a), by failing the 24-hour acute toxicity test for pimephales promelas; PENALTY: $7,760; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Citgo Refining and Chemicals Company, L.P.; DOCKET NUMBER: 2007-0594-AIR-E; IDENTIFIER: RN102555166; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §111.111(a)(1)(C) and §116.115(c), Air Permit Number 3123A, Special Conditions 1 and 3, and THSC, §382.085(b), by failing to prevent an unauthorized emissions event; PENALTY: $4,850; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(7) COMPANY: Crane Co.; DOCKET NUMBER: 2007-0774-WQ-E; IDENTIFIER: RN101194769; LOCATION: Montgomery, Montgomery County, Texas; TYPE OF FACILITY: manufacturing; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities; PENALTY: $3,180; ENFORCEMENT COORDINATOR: Deana Holland, (512) 239-2504; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (817) 588-5800.

(8) COMPANY: El Dorado Utility District; DOCKET NUMBER: 2007-0758-MWD-E; IDENTIFIER: RN101607299; LOCATION: Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011302001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limits; PENALTY: $1,200; ENFORCEMENT COORDINATOR: Deana Holland, (512) 239-2504; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (817) 588-5800.

(9) COMPANY: El Paso County Water Control Improvement District 4; DOCKET NUMBER: 2007-0980-PWS-E; IDENTIFIER: RN102673399; LOCATION: Fabens, El Paso County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(q)(1), by failing to issue a boil water notification; PENALTY: $395; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(10) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2007-0582-AIR-E; IDENTIFIER: RN103773206; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing; RULE VIOLATED: 30 TAC §116.115(c), New Source Review (NSR) Permit Number 4157A, Special Condition 1, and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limits; PENALTY: $7,000; ENFORCEMENT COORDINATOR: Bryan Elliott, (512) 239-6162; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: F. A. Nunnelly Company; DOCKET NUMBER: 2007-0912-MLM-E; IDENTIFIER: RN105161939; LOCATION: Bulverde, Comal County, Texas; TYPE OF FACILITY: commercial construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities and failing to develop and implement a storm water pollution prevention plan; and

30 TAC §330.15(a) and the Code, §26.121(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Deana Holland, (512) 239-2504; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(12) COMPANY: Frontera Truck Parts & Equipment, Inc.; DOCKET NUMBER: 2007-0989-WQ-E; IDENTIFIER: RN104855770; LOCATION: Waxahachie, Ellis County, Texas; TYPE OF FACILITY: automobile salvage; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction and industrial activities; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Hale County; DOCKET NUMBER: 2007-1290-PST-E; IDENTIFIER: RN101767416; LOCATION: Plainview, Hale County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), by failing to provide release detection; 30 TAC §334.50(d)(1)(B), by failing to implement inventory control methods; and 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ delivery certificate prior to receiving fuel; PENALTY: $4,375; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(14) COMPANY: I-Corp, Inc. dba I-Corp; DOCKET NUMBER: 2007-1287-WQ-E; IDENTIFIER: RN100635390; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: storm water; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit for storm water; PENALTY: $875; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(15) COMPANY: Indian Petro Corp. dba Champion Travel Plaza; DOCKET NUMBER: 2007-1286-PST-E; IDENTIFIER: RN102080744; LOCATION: San Jacinto County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), by failing to provide release detection; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(16) COMPANY: International Paper Company; DOCKET NUMBER: 2007-0666-IWD-E; IDENTIFIER: RN103884631; LOCATION: Camden, Polk County, Texas; TYPE OF FACILITY: lumber, chip, and plywood manufacturing; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0001598000, Effluent Limitations and Monitoring Requirements, and the Code, §26.121(a), by failing to comply with permit effluent limits; and 30 TAC §305.125(17) and TPDES Permit WQ0001598000, Monitoring and Reporting Requirements, by failing to submit discharge monitoring reports; PENALTY: $6,372; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(17) COMPANY: KM Liquids Terminals, L.P.; DOCKET NUMBER: 2007-0754-AIR-E; IDENTIFIER: RN100224815; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: petroleum product/segregated chemical transfer terminal; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 5171, Special Condition Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; Supplemental Environmental Project (SEP) offset amount of $5,000 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles; ENFORCEMENT COORDINATOR: Jessica Rhodes, (512) 239-2879; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: M&T Natural Stone, Inc.; DOCKET NUMBER: 2007-0707-WQ-E; IDENTIFIER: RN104320882; LOCATION: Santo, Palo Pinto County, Texas; TYPE OF FACILITY: dimensional stone quarry; RULE VIOLATED: 30 TAC §311.82(b) and the Code, §26.121(a)(2), by failing to obtain authorization to discharge storm water associated with industrial activity; PENALTY: $29,760; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-2670; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: Alvin Washington dba Organic Resource Management; DOCKET NUMBER: 2007-0755-MSW-E; IDENTIFIER: RN105137418; LOCATION: Del Valle, Travis County, Texas; TYPE OF FACILITY: unauthorized brush and mulch recycling; RULE VIOLATED: 30 TAC §330.9(a), by failing to obtain a registration or other authorization for the storage and processing of brush and mulch; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Marlin Bullard, (254) 751-0335; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(20) COMPANY: Parkside at Mayfield Ranch, Ltd.; DOCKET NUMBER: 2007-0897-EAQ-E; IDENTIFIER: RN105174916; LOCATION: Williamson County, Texas; TYPE OF FACILITY: construction activities for a proposed residential project; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of an Edwards Aquifer Water Pollution Abatement Plan prior to beginning a regulated activity over the Edwards Aquifer Recharge Zone; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(21) COMPANY: PD Glycol LP; DOCKET NUMBER: 2007-0838-AIR-E; IDENTIFIER: RN100825413; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: petrochemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), NSR Permit Number 8639A, Special Condition 3B, Federal Operating Permit Number O-2190, General Terms and Conditions and Special Condition 9, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $3,475; Supplemental Environmental Project (SEP) offset amount of $1,390 applied to South East Texas Regional Planning Commission-West Port Arthur Home Energy Efficiency Program; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(22) COMPANY: Alberto Ramos, Jr.; DOCKET NUMBER: 2007-0406-LII-E; IDENTIFIER: RN103369724; LOCATION: McAllen, Weslaco, and Edinburg; Hidalgo County, Texas; TYPE OF FACILITY: irrigation system installation; RULE VIOLATED: 30 TAC §344.70, by failing to comply with local inspection requirements, ordinances, or regulations designed to protect the public water supply; 30 TAC §344.94(b), by failing to include the statement: "Irrigation in Texas is regulated by the Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087" on all written contracts and bills to install irrigation systems; and 30 TAC §344.96, by failing to honor the promised warranty for two installed irrigation systems; PENALTY: $866; ENFORCEMENT COORDINATOR: Shontay Wilcher, (512) 239-2136; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(23) COMPANY: City of Reno; DOCKET NUMBER: 2007-0374-MWD-E; IDENTIFIER: RN102186772; LOCATION: Lamar County, Texas; TYPE OF FACILITY: wastewater treatment;

RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012162001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2 for Outfall 001A, and the Code, §26.121(a), by failing to comply with the permitted effluent limits; PENALTY: $4,994; Supplemental Environmental Project (SEP) offset amount of $3,996 applied to creating and operating a used oil and antifreeze collection and recycling center; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(24) COMPANY: City of Sabinal; DOCKET NUMBER: 2007-0139-MWD-E; IDENTIFIER: RN103014908; LOCATION: Uvalde County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014342001, Effluent Limitations and Monitoring Requirements Numbers 1 and 3, and the Code, §26.121(a), by failing to comply with the permit effluent limits; and 30 TAC §319.4 and §325.125(1) and TPDES Permit Number WQ0014342001, Monitoring and Reporting Requirements Number 1, by failing to monitor dissolved oxygen; PENALTY: $11,250; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(25) COMPANY: City of Temple; DOCKET NUMBER: 2007-0971-WQ-E; IDENTIFIER: RN105135636; LOCATION: Temple, Bell County, Texas; TYPE OF FACILITY: wastewater collection system line; RULE VIOLATED: the Code, §26.121(a), by failing to prevent and mitigate the unauthorized discharge and accumulation of sludge in the receiving stream; the Code, §26.039(b), by failing to notify the TCEQ of an unauthorized discharge; and 30 TAC §205.6 and the Code, §5.702 and §26.0291, by failing to pay outstanding general permits stormwater fees and associated late fees; PENALTY: $6,300; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(26) COMPANY: The Goodyear Tire & Rubber Company; DOCKET NUMBER: 2007-1033-AIR-E; IDENTIFIER: RN100870898; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: synthetic rubber manufacturing plant; RULE VIOLATED: 30 TAC §116.715(a), Flexible Air Permit Number 6618, Special Condition 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $4,450; Supplemental Environmental Project (SEP) offset amount of $1,780 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(27) COMPANY: Trinity Bay Conservation District; DOCKET NUMBER: 2007-0822-MWD-E; IDENTIFIER: RN102077393; LOCATION: Winnie, Chambers County, Texas; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10851001, Final Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limitations; and 30 TAC §305.125(1) and TPDES Permit Number 10851001, Biomonitoring Requirements, by failing to comply with permitted biomonitoring requirements; PENALTY: $18,400; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(28) COMPANY: Angie G. Vasquez; DOCKET NUMBER: 2007-0399-PST-E; IDENTIFIER: RN102268133; LOCATION: Pecos, Reeves County, Texas; TYPE OF FACILITY: property with underground storage tank (UST); RULE VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, four USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $10,500; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(29) COMPANY: Wise Ready Mix Concrete Company; DOCKET NUMBER: 2007-0785-IWD-E; IDENTIFIER: RN104547187; LOCATION: Wise County, Texas; TYPE OF FACILITY: ready mix concrete plant; RULE VIOLATED: 30 TAC §305.125(1), Wastewater General Permit Number TXG110495, Permit Requirements Section A, and the Code, §26.121(a), by failing to comply with permit effluent limits for TSS and pH; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200703956
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 29, 2007

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Enforcement Orders

An agreed order was entered regarding Silwad, Inc. dba Circle M Food Store, Docket No. 2004-1405-PST-E on August 8, 2007 assessing $13,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Killeen, Docket No. 2004-1836-PWS-E on August 8, 2007 assessing $1,473 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Heena Enterprises, Inc. dba Clark Store, Docket No. 2005-0162-PST-E on August 8, 2007 assessing $5,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-0063, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Al-Tahir U.S.A., Inc. dba Main Street Shell, Docket No. 2005-0292-PST-E on August 8, 2007 assessing $3,210 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Mack Pool dba A&P Water Company, Docket No. 2005-0962-MLM-E on August 8, 2007 assessing $6,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Sohail Afridi dba Lumberton Food Mart, Docket No. 2005-1449-PST-E on August 8, 2007 assessing $8,925 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mark Curnutt, Staff Attorney at (512) 239-0624, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Quick Shop #2, Inc. dba I 10 Fuelmart Etc, Docket No. 2005-1559-PST-E on August 8, 2007 assessing $12,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mark Curnutt, Staff Attorney at (512) 239-0624, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Jacinto City, Docket No. 2005-1937-MWD-E on August 8, 2007 assessing $6,823 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mark Curnutt, Staff Attorney at (512) 239-0624, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chong Bai Xia dba Twin Lakes Water Co., Docket No. 2006-0022-PWS-E on August 8, 2007 assessing $1,340 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Casey Croy, Docket No. 2006-0191-MSW-E on August 8, 2007 assessing $1,070 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Oloko, Staff Attorney at (713) 422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding A & B, Inc. dba The Corner Stop 3, Docket No. 2006-0306-PST-E on August 8, 2007 assessing $6,240 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Bonham, Docket No. 2006-1044-MWD-E on August 8, 2007 assessing $3,925 in administrative penalties with $785 deferred.

Information concerning any aspect of this order may be obtained by contacting Pam Campbell, Enforcement Coordinator at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lisa Cypert dba Munday Cleaners, Docket No. 2006-1153-DCL-E on August 8, 2007 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Manir Bata dba Addison Circle Cleaners II, Docket No. 2006-1298-DCL-E on August 8, 2007 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aqua Utilities, Inc. dba Aqua Texas, Inc., Docket No. 2006-1525-MWD-E on August 8, 2007 assessing $4,410 in administrative penalties with $882 deferred.

Information concerning any aspect of this order may be obtained by contacting Laurie Eaves, Enforcement Coordinator at (512) 239-4495, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Crown Beverage Packaging Inc., Docket No. 2006-1716-AIR-E on August 8, 2007 assessing $7,920 in administrative penalties with $1,584 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jorge Tangarife dba Diamond Xpress Cleaners, Docket No. 2006-1725-DCL-E on August 8, 2007 assessing $270 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin Thompson, Staff Attorney at (512) 239-1297, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Killeen, Docket No. 2006-1756-WQ-E on August 8, 2007 assessing $4,880 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurie Eaves, Enforcement Coordinator at (512) 239-4495, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cross-Cut Hardwoods, Inc., Docket No. 2006-1780-AIR-E on August 8, 2007 assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dusty L. Turner, Docket No. 2006-1806-LII-E on August 8, 2007 assessing $250 in administrative penalties with $50 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brazos Valley Petroleum Corporation dba In & Out 7, Docket No. 2006-1872-PST-E on August 8, 2007 assessing $12,600 in administrative penalties with $2,520 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Key Oil Company dba Lawndale Service Station, Docket No. 2006-1897-PST-E on August 8, 2007 assessing $14,500 in administrative penalties with $2,900 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Steve Torno dba Rodell Water Supply, Docket No. 2006-1899-PWS-E on August 8, 2007 assessing $1,100 in administrative penalties with $220 deferred.

Information concerning any aspect of this order may be obtained by contacting Anita Keese, Enforcement Coordinator at (956) 430-6034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pirafzal Corporation dba Stop-N-Drive 7, Docket No. 2006-1927-PST-E on August 8, 2007 assessing $2,625 in administrative penalties with $525 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at (512) 239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bastrop County Water Control and Improvement District No. 3, Docket No. 2006-1964-MWD-E on August 8, 2007 assessing $4,914 in administrative penalties with $982 deferred.

Information concerning any aspect of this order may be obtained by contacting J. Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding S & S USA Enterprises, Inc. dba Berry Food Store, Docket No. 2006-1983-PST-E on August 8, 2007 assessing $13,950 in administrative penalties with $2,790 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hilco United Services, Inc., Docket No. 2006-1985-PWS-E on August 8, 2007 assessing $3,780 in administrative penalties with $756 deferred.

Information concerning any aspect of this order may be obtained by contacting Anita Keese, Enforcement Coordinator at (956) 430-6034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Army & Air Force Exchange Service, Docket No. 2006-1990-AIR-E on August 8, 2007 assessing $2,200 in administrative penalties with $440 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Eco Resources, Inc., Docket No. 2006-2029-PWS-E on August 8, 2007 assessing $561 in administrative penalties with $112 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jacob Neycheril dba Singco Food Store, Docket No. 2006-2035-PST-E on August 8, 2007 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Corporation, Docket No. 2006-2043-AIR-E on August 8, 2007 assessing $10,469 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Riata Energy, Inc., Docket No. 2006-2062-AIR-E on August 8, 2007 assessing $2,675 in administrative penalties with $535 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Capital City-Bee Caves, Ltd., Docket No. 2006-2065-EAQ-E on August 8, 2007 assessing $31,500 in administrative penalties with $6,300 deferred.

Information concerning any aspect of this order may be obtained by contacting Cari-Michel LaCaille, Enforcement Coordinator at (512) 239-1387, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Roanoke, Docket No. 2006-2087-PWS-E on August 8, 2007 assessing $802 in administrative penalties with $160 deferred.

Information concerning any aspect of this order may be obtained by contacting Pamela Campbell, Enforcement Coordinator at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding John Ali Hemati dba Mimbela Fuel & Oil, Docket No. 2006-2088-PST-E on August 8, 2007 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding E. I. du Pont de Nemours and Company, Docket No. 2006-2093-AIR-E on August 8, 2007 assessing $8,800 in administrative penalties with $1,760 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Robinson, Docket No. 2006-2170-IWD-E on August 8, 2007 assessing $4,960 in administrative penalties with $992 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-

5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of College Station, Docket No. 2006-2189-MWD-E on August 8, 2007 assessing $4,700 in administrative penalties with $940 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Joe Perez dba J & R Body Shop, Docket No. 2006-2195-AIR-E on August 8, 2007 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Port of Houston Authority, Docket No. 2006-2197-MWD-E on August 8, 2007 assessing $4,620 in administrative penalties with $924 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Sansom Park, Docket No. 2006-2233-PWS-E on August 8, 2007 assessing $1,890 in administrative penalties with $378 deferred.

Information concerning any aspect of this order may be obtained by contacting Amy Martin, Enforcement Coordinator at (512) 239-2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Polymer Services, Inc., Docket No. 2006-2243-MLM-E on August 8, 2007 assessing $38,755 in administrative penalties with $7,751 deferred.

Information concerning any aspect of this order may be obtained by contacting Pam Campbell, Enforcement Coordinator at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Dumas, Docket No. 2006-2254-MWD-E on August 8, 2007 assessing $2,704 in administrative penalties with $540 deferred.

Information concerning any aspect of this order may be obtained by contacting J. Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jack Neely dba Heights Water Company, Docket No. 2006-2256-PWS-E on August 8, 2007 assessing $1,785 in administrative penalties with $357 deferred.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villareal, Enforcement Coordinator at (210) 403-4033, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Southern Union Pipeline, Ltd., Docket No. 2007-0008-AIR-E on August 8, 2007 assessing $3,050 in administrative penalties with $610 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gilbert O. Reyes Jr. dba Party Time II, Docket No. 2007-0017-AIR-E on August 8, 2007 assessing $650 in administrative penalties with $130 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Girl Scouts-Circle T Council, Inc. dba Camp Timberlake, Docket No. 2007-0019-PWS-E on August 8, 2007 assessing $510 in administrative penalties with $102 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-1482, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding C&R Water Supply Inc., Docket No. 2007-0035-MWD-E on August 8, 2007 assessing $16,896 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Azim & Ruhee, Inc. dba Salyers Short Stop, Docket No. 2007-0046-PST-E on August 8, 2007 assessing $1,155 in administrative penalties with $231 deferred.

Information concerning any aspect of this order may be obtained by contacting Phillip DeFrancesco, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dondi and Donna Tipton dba Tipton Texaco and Harvey and Beth Tipton dba Tipton Texaco, Docket No. 2007-0047-PST-E on August 8, 2007 assessing $3,745 in administrative penalties with $749 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding 6700 McHard, Inc. dba Greater Houston Gun Club, Docket No. 2007-0054-PWS-E on August 8, 2007 assessing $6,020 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villareal, Enforcement Coordinator at (210) 403-4033, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rosebud-Lott Independent School District, Docket No. 2007-0056-PWS-E on August 8, 2007 assessing $460 in administrative penalties with $92 deferred.

Information concerning any aspect of this order may be obtained by contacting Amy Martin, Enforcement Coordinator at (512) 239-2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Approach Operating LLC, Docket No. 2007-0090-AIR-E on August 8, 2007 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Jessica Rhodes, Enforcement Coordinator at (512) 239-2879, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Byers, Docket No. 2007-0105-PWS-E on August 8, 2007 assessing $1,130 in administrative penalties with $226 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Watco Tanks, Inc., Docket No. 2007-0118-AIR-E on August 8, 2007 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Lindsey Jones, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Valero Refining-Texas, L.P., Docket No. 2007-0131-AIR-E on August 8, 2007 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NDV Enterprises, Inc. dba Chubbys 3, Docket No. 2007-0147-PST-E on August 8, 2007 assessing $2,675 in administrative penalties with $535 deferred.

Information concerning any aspect of this order may be obtained by contacting Phillip DeFrancesco, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding J & C Construction, Inc., Docket No. 2007-0150-MSW-E on August 8, 2007 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tex Mix Partners, Ltd., Docket No. 2007-0228-WQ-E on August 8, 2007 assessing $740 in administrative penalties with $148 deferred.

Information concerning any aspect of this order may be obtained by contacting J. Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding John W. Cooke dba Pippen Motor, Docket No. 2007-0319-PST-E on August 8, 2007 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding N.B. Wood Recycling and Construction, Ltd., Docket No. 2007-0346-MSW-E on August 8, 2007 assessing $500 in administrative penalties with $100 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Transit Mix Concrete & Materials Company, Docket No. 2007-0361-AIR-E on August 8, 2007 assessing $3,220 in administrative penalties with $644 deferred.

Information concerning any aspect of this order may be obtained by contacting Jessica Rhodes, Enforcement Coordinator at (512) 239-2879, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Andrew Pena dba A-One Aircraft Paint, Docket No. 2007-0398-IHW-E on August 8, 2007 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Limos, Enforcement Coordinator at (512) 239-5839, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Valero Refining-Texas, L.P., Docket No. 2006-1067-AIR-E on August 8, 2007 assessing $119,149 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Bryan Elliott, Enforcement Coordinator at (512) 239-6162, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Nam Sun Paek dba Metro Cleaners and Custom Cleaners, Docket No. 2006-0855-DCL-E on August 8, 2007 assessing $2,370 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at (512) 239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Moore County Hospital District, Docket No. 2007-0633-PST-E on August 8, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Jayvik Auto Systems, Inc. dba Speedee Oil Change & Tune Up, Docket No. 2007-0474-PST-E on August 8, 2007 assessing $1,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Groendyke Transport, Inc., Docket No. 2007-0634-WQ-E on August 8, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texcan Consulting, Inc. dba Trainer Hale Truck Stop, Docket No. 2006-0225-PST-E on August 8, 2007 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200703958
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 29, 2007

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Enforcement Orders

A default order was entered regarding Omar Rodriguez dba R & B Services, Docket No. 2002-0694-LII-E on August 22, 2007 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary Hammer, Staff Attorney at (512) 239-2496, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding E. I. DuPont de Nemours & Company, Inc., Docket No. 2003-1371-MLM-E on August 22, 2007 assessing $53,230 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jim Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Brenham, Docket No. 2004-0114-MLM-E on August 22, 2007 assessing $44,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Orange, Docket No. 2005-0059-MWD-E on August 22, 2007 assessing $36,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Blossom, Docket No. 2005-0256-MWD-E on August 22, 2007 assessing $10,221 in administrative penalties with $2,044 deferred.

Information concerning any aspect of this order may be obtained by contacting Laurie Eaves, Enforcement Coordinator at (512) 239-4495, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Danny Crump dba Southend Grocery, Docket No. 2005-0784-PST-E on August 22, 2007 assessing $1,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Imran Charolia, Docket No. 2005-0889-PST-E on August 22, 2007 assessing $7,875 in administrative penalties with $1,575 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Donald Savage dba Redi-Strip, Docket No. 2005-0913-IHW-E on August 22, 2007 assessing $31,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding M & H Crates, Inc., Docket No. 2005-0965-AIR-E on August 22, 2007 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Camp For All Foundation, Docket No. 2005-1041-MWD-E on August 22, 2007 assessing $3,240 in administrative penalties with $648 deferred.

Information concerning any aspect of this order may be obtained by contacting Laurie Eaves, Enforcement Coordinator at (512) 239-4495, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Lee Landers dba Acorn Mobile Home Park, Docket No. 2006-0246-PWS-E on August 22, 2007 assessing $1,950 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Westlake JV, Inc. dba Renaissance Builders, Docket No. 2006-0511-WQ-E on August 22, 2007 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary Hammer, Staff Attorney at (512) 239-2496, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding C. Johnnie-on-the-Spot Portable Toilets, Inc., Docket No. 2006-0671-SLG-E on August 22, 2007 assessing $8,500 in administrative penalties with $1,700 deferred.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Arlington, Docket No. 2006-0720-WQ-E on August 22, 2007 assessing $11,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Pamela Campbell, Enforcement Coordinator at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding YTK Enterprises, Inc. dba Comet One Hour Cleaners and dba The Cleaners, Docket No. 2006-

0839-DCL-E on August 22, 2007 assessing $1,778 in administrative penalties with $356 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dillard Dry Cleaning & Restoration, Inc. dba Marvel Cleaners, Docket No. 2006-0934-DCL-E on August 22, 2007 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Youn Ok Kim dba Aunt Annies 5, Docket No. 2006-0967-PWS-E on August 22, 2007 assessing $2,940 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary Hammer, Staff Attorney at (512) 239-2679, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Joe K. Hopper, Docket No. 2006-1065-LII-E on August 22, 2007 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Justin Lannen, Staff Attorney at (817) 588-5927, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Tony Nguyen dba Classic Cleaners, Docket No. 2006-1103-DCL-E on August 22, 2007 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin Thompson, Staff Attorney at (512) 239-1297, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Zulfiqar Noorani dba Country Cleaners, Docket No. 2006-1201-DCL-E on August 22, 2007 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary Hammer, Staff Attorney at (512) 239-2496, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lan C. Bui dba Tip Top Cleaners, Docket No. 2006-1280-DCL-E on August 22, 2007 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Amy Martin, Enforcement Coordinator at (512) 239-2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Nazar Ali dba Deville Cleaners, Docket No. 2006-1296-DCL-E on August 22, 2007 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-1877, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Phuong Tam Enterprises, Inc. dba King Cleaners, Docket No. 2006-1354-DCL-E on August 22, 2007 assessing $1,209 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Oloko, Staff Attorney at (713) 422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Vicki Atkins dba Bon Ton Cleaners, Docket No. 2006-1407-DCL-E on August 22, 2007 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Hung Le dba Elite Cleaners, Docket No. 2006-1444-DCL-E on August 22, 2007 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Thuc X. Bui dba Cadillac Cleaner, Docket No. 2006-1645-DCL-E on August 22, 2007 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hidalgo County, Docket No. 2006-1682-MSW-E on August 22, 2007 assessing $12,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding INVISTA S.à.r.l., LLC, Docket No. 2006-1740-AIR-E on August 22, 2007 assessing $120,666 in administrative penalties with $24,133 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Denville Business, Inc dba Deville $1.25 Cleaners aka Denville Cleaners, Docket No. 2006-1757-DCL-E on August 22, 2007 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mark Curnutt, Staff Attorney at (512) 239-0624, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Guillermo Fajardo dba Michael's Scrap Metal No. 2, Docket No. 2006-1966-WQ-E on August 22, 2007 assessing $2,100 in administrative penalties with $420 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (512)

239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Alina & Zainab, Inc. dba Sawdust Chevron, Docket No. 2006-2020-PST-E on August 22, 2007 assessing $7,200 in administrative penalties with $1,440 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Loadcraft Industries, Ltd., Docket No. 2006-2021-MLM-E on August 22, 2007 assessing $43,028 in administrative penalties with $8,605 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Farmers Milling Company of Graham, Inc., Docket No. 2006-2061-AIR-E on August 22, 2007 assessing $16,000 in administrative penalties with $3,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Department of Criminal Justice, Docket No. 2006-2188-MWD-E on August 22, 2007 assessing $40,280 in administrative penalties with $8,056 deferred.

Information concerning any aspect of this order may be obtained by contacting Laurie Eaves, Enforcement Coordinator at (512) 239-4495, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Dow Chemical Company, Docket No. 2006-2225-AIR-E on August 22, 2007 assessing $87,192 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Camp Olympia, Inc., Docket No. 2006-2226-MWD-E on August 22, 2007 assessing $2,450 in administrative penalties with $490 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Weatherford U.S., L.P., Docket No. 2006-2228-IWD-E on August 22, 2007 assessing $8,800 in administrative penalties with $1,760 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NJB & Sons, Inc. dba Greenbrier Golf Club, Docket No. 2007-0021-MWD-E on August 22, 2007 assessing $1,250 in administrative penalties with $250 deferred.

Information concerning any aspect of this order may be obtained by contacting Kim Morales, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Delta Brands, Inc., Docket No. 2007-0024-AIR-E on August 22, 2007 assessing $8,400 in administrative penalties with $1,680 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Maganbhai R. Patel, Bhagubhai B. Patel, Vinubhai B. Patel, and Laxmiben L. Patel dba Holiday Motel, Docket No. 2007-0027-MWD-E on August 22, 2007 assessing $13,875 in administrative penalties with $2,775 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Cleveland, Docket No. 2007-0036-MWD-E on August 22, 2007 assessing $5,200 in administrative penalties with $1,040 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Equistar Chemicals, LP, Docket No. 2007-0039-AIR-E on August 22, 2007 assessing $80,191 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Transcontinental Gas Pipe Line Corporation, Docket No. 2007-0041-AIR-E on August 22, 2007 assessing $2,240 in administrative penalties with $448 deferred.

Information concerning any aspect of this order may be obtained by contacting Jessica Rhodes, Enforcement Coordinator at (512) 239-2879, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Occidental Permian Ltd., Docket No. 2007-0044-AIR-E on August 22, 2007 assessing $25,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pedro Sandate, Docket No. 2007-0059-LII-E on August 22, 2007 assessing $625 in administrative penalties with $125 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KM Liquids Terminals, L.P., Docket No. 2007-0072-AIR-E on August 22, 2007 assessing $5,814 in administrative penalties with $1,162 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Associated Rack Corporation, Docket No. 2007-0078-AIR-E on August 22, 2007 assessing $5,680 in administrative penalties with $1,136 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Petrochemicals LP, Docket No. 2007-0080-IHW-E on August 22, 2007 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rescar, Inc., Docket No. 2007-0087-AIR-E on August 22, 2007 assessing $34,000 in administrative penalties with $6,800 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WTG Gas Processing, L.P., Docket No. 2007-0093-AIR-E on August 22, 2007 assessing $2,444 in administrative penalties with $488 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Eufrocina Merino dba Roslyn Food Mart, Docket No. 2007-0106-PST-E on August 22, 2007 assessing $3,900 in administrative penalties with $780 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Winnsboro, Docket No. 2007-0127-MWD-E on August 22, 2007 assessing $6,650 in administrative penalties with $1,330 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kinder Morgan Petcoke GP LLC, Docket No. 2007-0142-MLM-E on August 22, 2007 assessing $3,675 in administrative penalties with $735 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Citgo Refining and Chemicals Company, L.P., Docket No. 2007-0170-AIR-E on August 22, 2007 assessing $5,550 in administrative penalties with $1,110 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding INEOS USA LLC, Docket No. 2007-0175-AIR-E on August 22, 2007 assessing $5,225 in administrative penalties with $1,045 deferred.

Information concerning any aspect of this order may be obtained by contacting Bryan Elliott, Enforcement Coordinator at (512) 239-6162, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Matheson Tri-Gas, Inc., Docket No. 2007-0201-IWD-E on August 22, 2007 assessing $2,780 in administrative penalties with $556 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jacobs Water Supply Corporation, Docket No. 2007-0202-PWS-E on August 22, 2007 assessing $805 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (210) 403-4077, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Affiliated Crown Developments, LTD., Docket No. 2007-0215-WR-E on August 22, 2007 assessing $2,235 in administrative penalties with $447 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tommy Christopher Moore, Docket No. 2007-0216-LII-E on August 22, 2007 assessing $250 in administrative penalties with $50 deferred.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mills Road Municipal Utility District, Docket No. 2007-0262-MWD-E on August 22, 2007 assessing $2,140 in administrative penalties with $428 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Murphy Oil USA, Inc. dba Murphy USA 5708, Docket No. 2007-0287-PST-E on August 22, 2007 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting Phillip DeFrancesco, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Huntington, Docket No. 2007-0329-MWD-E on August 22, 2007 assessing $3,960 in administrative penalties with $792 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Petrochemicals LP, Docket No. 2007-0365-AIR-E on August 22, 2007 assessing $20,000 in administrative penalties with $4,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Nixon, Docket No. 2007-0373-MWD-E on August 22, 2007 assessing $1,400 in administrative penalties with $1,120 deferred.

Information concerning any aspect of this order may be obtained by contacting Cari-Michel LaCaille, Enforcement Coordinator at (512) 239-1387, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Fort Worth, Docket No. 2007-0387-AIR-E on August 22, 2007 assessing $2,200 in administrative penalties with $440 deferred.

Information concerning any aspect of this order may be obtained by contacting Lindsey Jones, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Larry Skero, Docket No. 2007-0450-LII-E on August 22, 2007 assessing $262 in administrative penalties with $52 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Contractor's Supplies, Inc., Docket No. 2007-0622-IWD-E on August 22, 2007 assessing $2,190 in administrative penalties with $438 deferred.

Information concerning any aspect of this order may be obtained by contacting Cari-Michel LaCaille, Enforcement Coordinator at (512) 239-1387, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Apex of Texas Homes, LP, Docket No. 2007-0682-WQ-E on August 22, 2007 assessing $2,100 in administrative penalties with $420 deferred.

Information concerning any aspect of this order may be obtained by contacting Laurie Eaves, Enforcement Coordinator at (512) 239-4495, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Yash Hospitality, Inc. dba Express Food Store, Docket No. 2007-0281-PST-E on August 22, 2007 assessing $1,750 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding The Trinity Company dba Hale County Compress Bldg 1 Main, Docket No. 2007-0630-WQ-E on August 22, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding The Trinity Company dba Lockney Warehouse, Docket No. 2007-0631-WQ-E on August 22, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Chester L. Slay, Jr., individually; Union Texas Limited Partnership; and Chester L. Slay, Jr., Trustee of Peckham Family Trust, Docket No. 2000-0396-IHW-E on August 13, 2007 assessing $177,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Al Jodoin dba Lake Whitney RV Community, Docket No. 2004-1768-MWD-E on August 13, 2007 assessing $2,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200703959
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 29, 2007

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Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapters 37, 39, 281, and 336

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 37, Financial Assurance; Chapter 39, Public Notice; Chapter 281, Applications Processing; and Chapter 336, Radioactive Substance Rules, under the requirements of Texas Health and Safety Code, §382.017; and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement Senate Bill (SB) 1604 from the 80th Texas Legislative Session relating to transfer of certain regulatory responsibilities for radioactive waste from the Texas Department of State Health Services (DSHS) to the TCEQ. SB 1604 transfers regulatory authority to the TCEQ for commercial radioactive waste processing, uranium mining, and by-product disposal. SB 1604 also addresses the process for TCEQ's continued review of a pending application submitted by Waste Control Specialists LLC (WCS) to DSHS for a by-product disposal facility proposed for Andrews County. SB 1604 also addresses the TCEQ's underground injection control program for regulation of in situ uranium mining and requires the TCEQ to establish and administer a new state fee for the disposal of radioactive wastes other than low-level radioactive waste. In addition, the proposed rulemaking would establish technical requirements, application processing requirements, public notice requirements, licensing and application fees, and financial assurance requirements for the licensing programs transferred from the DSHS to the TCEQ.

A public hearing on this proposal will be held in Austin, Texas, on September 25, 2007, at 10:00 a.m., in Building E, Room 201S, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing with special communication or other accommodation needs should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

Comments may be submitted to Patricia Durón, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments.* File size restrictions may apply to comments being submitted via the eComments system. The comment period closes October 15, 2007. All comments should reference Rule Project Number 2007-028-336-PR. The proposed revisions may be viewed on the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information or questions concerning this proposal, please contact Susan Jablonski, Director, Radioactive Materials Division, at (512) 239-6731.

TRD-200703831
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 23, 2007

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Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapter 116 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning proposed revisions to 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, and to the state implementation plan (SIP), under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The proposed rulemaking would revise §116.114(a) to add deadlines associated with the review of Advanced Clean Energy Projects (ACEP) permit applications.

The commission will hold a public hearing on this proposal in Austin on September 24, 2007 at 2:00 p.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building F, Room 2210. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to informally discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services, at (512) 239-0177.

Comments may be submitted to Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-023-116-PR. The comment period closes September 26, 2007. Copies of the proposed rule can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Michael Wilhoit, Air Permits Division, (512) 239-1222.

TRD-200703907
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: August 27, 2007

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 8, 2007**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 8, 2007**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Alex L. Cruz; DOCKET NUMBER: 2006-1726-LII-E; TCEQ ID NUMBER: RN103542270; LOCATION: 131 Rosabell

Street, San Antonio, Bexar County, Texas; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), Texas Water Code (TWC), §37.003 and Texas Occupations Code, §1903.251, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system; PENALTY: $625; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Glenn Klein dba Sunburst Lawn & Landscaping; DOCKET NUMBER: 2006-1695-LII-E; TCEQ ID NUMBER: RN104789003; LOCATION: 14173 Northwest Freeway Number 178, Houston, Harris County, Texas; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §334.4(a) and §30.5(a) and (b); TWC, §37.003; and Texas Occupations Code, §1903.251, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system; PENALTY: $625; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(3) COMPANY: Jamie Garcia; DOCKET NUMBER: 2006-0077-MSW-E; TCEQ ID NUMBER: RN104799101; LOCATION: Intersection of Highway 281 and County Road 285, Falfurrias, Brooks County and an unauthorized site located 3/4 mile west of County Road 206, on County Road 410, Jim Wells County, Texas; TYPE OF FACILITY: vacant building; RULES VIOLATED: 30 TAC §330.5(c), by causing suffering and allowing or permitting the dumping or disposal of municipal solid waste, including demolition debris, at an unauthorized facility; PENALTY: $3,000; STAFF ATTORNEY: Alfred Oloko, Litigation Division, MC R-12, (713) 422-8918; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

TRD-200703935
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 28, 2007

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 8, 2007**. The commission will consider any written comments received; and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 8, 2007**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Chez-Salin Quality Cleaners, Inc. dba Rodeo Cleaners 1, dba Rodeo Cleaners 2, dba Rodeo Cleaners 3, and dba Lyric South Cleaners; DOCKET NUMBER: 2006-0651-DCL-E; TCEQ ID NUMBERS: RN104087390, RN104087473, RN104087416, and RN102150364; LOCATION: 5414 West Military Drive, 633 South WW White Road, 4707 Pecan Valley Drive, and 2606 Pleasanton Road, Bexar County, San Antonio, Texas; TYPE OF FACILITIES: one dry cleaning facility and three dry cleaning drop stations; RULES VIOLATED: 30 TAC §337.11(e) and Texas Health and Safety Code (THSC), §374.102, by failing to renew its registration by completing and submitting the required registration forms to the TCEQ for the Lyric South Cleaners facility; 30 TAC §337.14(c) and Texas Water Code (TWC), §5.702, by failing to pay its outstanding dry cleaner fees on TCEQ Account No. 24001817 for the Lyric South Cleaners facility; 30 TAC §337.11(e) and THSC, §374.102, by failing to renew its registration by completing and submitting the required registration forms to the TCEQ for the Rodeo Cleaners 1 facility; 30 TAC §337.14(c) and TWC, §5.702, by failing to pay its outstanding dry cleaner fees on TCEQ Account No. 24001817 for the Rodeo Cleaners 1 Facility; 30 TAC §337.11(e) and THSC, §374.102, by failing to renew its registration by completing and submitting the required registration forms to the TCEQ for the Rodeo Cleaners 2 facility; 30 TAC §337.14(c) and TWC, §5.702, by failing to pay its outstanding dry cleaner fees on TCEQ Account No. 24001817 for the Rodeo Cleaners 2 facility; 30 TAC §337.11(e) and THSC, §374.102, by failing to renew its registration by completing and submitting the required registration forms to the TCEQ for the Rodeo Cleaners 3 facility; and 30 TAC §337.14(c) and TWC, §5.702, by failing to pay its outstanding dry cleaner fees on TCEQ Account No. 24001817 for the Rodeo Cleaners 3 facility; PENALTY: $4,740; STAFF ATTORNEY: Becky Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Joseph Sandoval dba Plaza Mobile Home Park; DOCKET NUMBER: 2006-0531-MLM-E; TCEQ ID NUMBER: RN104942107; LOCATION: 811 Corrinne Drive, San Antonio, Bexar County, Texas; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §291.101(a) and TWC, §13.242(a), by failing to obtain a Certificate of Convenience and Necessity from the commission prior to rendering retail water service; 30 TAC §291.21(a), and TWC, §13.190, by failing to obtain an approved tariff from the commission prior to demanding and collecting monetary compensation for providing retail water and wastewater service; 30 TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(A), and THSC, §341.033(d), by failing to perform routine monthly bacteriological sampling of the public water supply and by failing to provide public notification of the failure to conduct monthly bacteriological sampling

during the months of May, June, July, August, September, and October 2006; and 30 TAC §290.51(a)(3) and TWC, §5.702, by failing to pay all annual and late Pesticide Head Sampler fees for TCEQ Financial Administration Account No. 90150552; PENALTY: $3,135; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(3) COMPANY: Kmali Enterprises, Inc. dba Friendly Mart; DOCKET NUMBER: 2006-1430-PWS-E; TCEQ ID NUMBER: RN101438802; LOCATION: 19234 Kuykendahl, Spring, Harris County, Texas; TYPE OF FACILITY: convenience store with a public water supply; RULES VIOLATED: 30 TAC §290.41(c)(1)(F), by failing to secure a sanitary control easement covering all property within 150 feet of the well; 30 TAC §290.118(a) and (b), by failing to provide public drinking water that meets the secondary constituent level for pH; and 30 TAC §290.41(c)(1)(A), by failing to locate the well site so that the well is not located within 150 feet of a petroleum underground storage tank (UST); PENALTY: $804; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: Marlin Gruber; DOCKET NUMBER: 2004-0679-PST-E; TCEQ ID NUMBER: RN104137054; LOCATION: 211 Court Street Highway 90, Newton, Newton County, Texas; TYPE OF FACILITY: auto repair business; RULES VIOLATED: 30 TAC §334.55(a)(2) and (a)(3) and §334.401(a) and (b), by failing to obtain a registered and licensed UST contractor and on-site supervisor to perform the removal of the UST system; and 30 TAC §334.6(a)(2), (b)(2) and (b)(2)(C), by failing to submit to the commission the required notification before removing the USTs from the site; PENALTY: $4,050; STAFF ATTORNEY: James Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(5) COMPANY: Mimi Hoang Investment, Inc. dba Rich Cleaners; DOCKET NUMBER: 2006-1427-DCL-E; TCEQ ID NUMBERS: RN104411582, RN101637320, and RN104411574; LOCATION: 11920 Westheimer Road (facility 1), 9543 Richmond Avenue (facility 2), 2719 Chimney Rock Road (facility 3), Houston, Harris County, Texas; TYPE OF FACILITIES: dry cleaning drop stations; RULES VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the required registration by completing and submitting the required form to the TCEQ for facilities 1, 2, and 3; and 30 TAC §337.14(c) and TWC, §5.702, by failing to pay dry cleaner registration fees and associated late fees for TCEQ Financial Administration Account No. 24002324 for Fiscal Year 2006; PENALTY: $3,555; STAFF ATTORNEY: Mark Curnutt, Litigation Division, MC 175, (512) 239-0624; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200703936
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: August 28, 2007

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that, before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 8, 2007**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 8, 2007**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: Abdulaziz Ibrahim dba Specialty Cleaners; DOCKET NUMBER: 2006-0891-DCL-E; TCEQ ID NUMBER: RN103955332; LOCATION: 6333 East Mockingbird Lane, Suite 119B, Dallas County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULES VIOLATED: 30 TAC §337.10(a) and Texas Health and Safety Code (THSC), §374.102, by failing to complete and submit the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $899; STAFF ATTORNEY: Mary Coleman, Litigation Division, MC R-4, (817) 588-5917; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Aqua Texas, Inc. dba Country View Estates; DOCKET NUMBER: 2006-0801-MLM-E; TCEQ ID NUMBER: RN102679347; LOCATION: 2.6 miles west of the intersection of Highway 16 and Park Road 37, Medina County, Texas; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §305.42(a) and Texas Water Code (TWC), §26.121(a), by failing to obtain a permit from the commission prior to any discharge of wastewater as documented on May 17, 2006; and 30 TAC §290.42(m), by failing to provide an intruder-resistant fence to protect the booster station; PENALTY: $2,202; STAFF ATTORNEY: Dinniah Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(3) COMPANY: City of Follett; DOCKET NUMBER: 2003-1241-WD-E; TCEQ ID NUMBER: RN101916559; LOCATION: one mile north of State Highway 15 and approximately one mile west of Farm-to-Market Road 1454, Follett, Lipscomb County, Texas; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1); TWC, §26.121(a)(1); and Texas Pollutant Discharge Elimination System Permit No. 10508-001, Monitoring Requirements and Effluent Limitations, by failing to maintain effluent levels within permitted limits for 5-day biochemical oxygen demand (BOD5), pH, Total Suspended Solids, and fecal coliform; PENALTY: $10,560; STAFF ATTORNEY: Robert Mosley, Litigation Division,

MC 175, (512) 239-0627; REGIONAL OFFICE: Amarillo Regional Office, 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(4) COMPANY: Dosan Enterprises, Inc. dba Professional Cleaners; DOCKET NUMBER: 2006-1409-DCL-E; TCEQ ID NUMBER: RN104996285; LOCATION: 5035 A Farm-to-Market Road 2920, Spring, Harris County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULES VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200703937

Mary R. Risner

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: August 28, 2007

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that, before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 8, 2007**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

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(1) COMPANY: Effluent Recycling, Inc.; DOCKET NUMBER: 2003-1533-MLM-E; TCEQ ID NUMBERS: RN102755089 and RN101569879; LOCATION: 1010 Benjamin Street (facility 1), Fort Worth, Tarrant County and 1117 South Commerce Ranger (facility 2), Eastland County, Texas; TYPE OF FACILITY: hazardous waste storage facility and used oil handling facility; RULES VIOLATED: 30 TAC §335.112(a)(9) and 40 Code of Federal Regulations (CFR) §265.192, by failing to provide a written assessment that was reviewed and certified by an independent, qualified registered professional engineer; 30 TAC §335.2(a) and §335.43(a), and 40 CFR §270.1(c), by failing to obtain a permit to store hazardous waste in on-site storage tank number 3, the in-ground tank, and frac tanks numbers 1 and 2; 30 TAC §335.112(a)(9) and 40 CFR §265.193, by failing to install and maintain secondary containment which is designed to prevent any migration of waste or accumulated liquids out of the tank system into the soil, groundwater, surface water, at any time during the use of the tank system; 30 TAC §335.112(a)(9) and 40 CFR §265.195, by failing to provide documentation for inspections conducted on the tank system; 30 TAC §335.112(a)(8) and 40 CFR §265.176, by failing to maintain containers holding ignitable waste at least 50 feet from facility 1's property line; 30 TAC §335.112(a)(8) and 40 CFR, §265.173, by failing to close hazardous waste containers, except when it is necessary to add or remove waste; 30 TAC §327.3(b) and §327.5(c), by failing to make notifications of reportable discharges or spills into the environment within 24 hours; 30 TAC §335.62 and 40 CFR §262.11, by failing to conduct a complete Hazardous Waste Determination for the ground storage tank bottoms, the contents of the four storage tanks, the contaminated oil in the roll-off box, the contents of the in-ground settling tank adjacent to the roll-off box, and the contents of the frac tanks numbers 1 and 2; 30 TAC §335.4(1) by failing to prevent the disposal of industrial solid waste in such a manner to cause the discharge or imminent threat of discharge into or adjacent to the waters in the state without specified authorizations; 30 TAC §335.5 and §335.6(a) by failing to deed record and by failing to comply with written or electronic notification requirements for the disposal of industrial solid waste at facility 2; 30 TAC §324.4, 40 CFR §279.12(a), and Texas Water Code (TWC), §26.121, by failing to manage used oil in such a manner as to not endanger the welfare of the environment; 30 TAC §324.6 and 40 CFR §279.22, by failing to maintain six 12,000 gallon used oil tanks in good condition with no visible leaks, and labeled or marked clearly with the words "Used Oil"; 30 TAC §324.1 and §324.12(3), and 40 CFR §§279.44 (a), 279.53(a) and 279.57, by failing to provide documentation to meet the rebuttable presumption for used oil as a transporter and processor/re-refiner under the rebuttable presumption of 40 CFR §279.10(b)(1)(ii) and by failing to meet operating record requirements for not having a facility analysis plan; and 30 TAC §324.12 and 40 CFR §279.52, by failing to maintain and operate facility 2 to minimize the possibility of a fire or explosion; PENALTY: $72,015; STAFF ATTORNEY: Shawn Slack, Litigation Division, MC 175, (512) 239-0063; REGIONAL OFFICE: bilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674; Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Wholesale Cleaners, Inc. dba Meyerland Cleaners; DOCKET NUMBER: 2006-1514-DCL-E; TCEQ ID NUMBER: RN104983895; LOCATION: 4815 Bissonnet Street, Bellaire, Harris County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULES VIOLATED: 30 TAC §337.10(a) and Texas Health and Safety Code (THSC), §374.102, by failing to complete and submit the required registration form to the TCEQ for a dry cleaning/drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Mary Coleman, Litigation Division MC R-4, (817) 588-5917; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200703938

Mary R. Risner

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: August 28, 2007

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Notice of Water Quality Applications

The following notices were issued during the period of August 16, 2007 through August 24, 2007.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

AKZO NOBEL CHEMICALS INC AND AKZO NOBEL POLYMER CHEMICALS LLC which operates the Deer Park Metal Alkalys, an organometallic compound manufacturing facility, has applied for a major amendment to TPDES Permit No. WQ0004119000 to authorize an increase in the discharge of storm water and wash sumps, primary treatment plant effluent (wash water from process equipment cleaning), domestic wastewater and cooling tower blowdown from a daily average dry weather flow not to exceed 30,000 gallons per day to a daily average flow not to exceed 38,333 gallons per day via Outfall 001. The current permit authorizes the discharge of storm water associated with industrial activity, process area wash water, domestic wastewater, and cooling tower blowdown at a daily average dry weather flow not to exceed 30,000 gallons per day via Outfall 001, and domestic wastewater at a daily average dry weather flow not to exceed 5,000 gallons per day via Outfall 101. The facility is located east of and adjacent to State Highway 134, approximately 2500 feet north of the intersection of State Highways 134 and 225, in the City of La Porte, Harris County, Texas.

BP PRODUCTS NORTH AMERICA INC. which operates a petroleum refinery producing petrochemicals, has applied for a major amendment to TPDES Permit No. WQ0000443000 to authorize additional discharges of cooling water blowdown and storm water via proposed Outfall 004, authorize the discharge of cooling tower blowdown and treated process wastewater from the wastewater treatment plant on a flow variable basis via proposed Outfall 005; authorization to discharge land farm storm water runoff via existing Outfall 003; a reduction in the 24-hour whole effluent toxicity testing frequency from once per quarter to once per six months; and the discharge of process wastewater overflow via existing Outfall 003. The current permit authorizes the discharge of treated process water, storm water, ballast water, domestic sewage, groundwater from remediation project, effluent from the Amoco Chemical Plant land farm and effluent from the Smith Douglas Plant Site wastewaters at a daily average flow not to exceed 23,000,000 gallons per day via Outfall 001; water treatment plant sludge settling pond effluent at a daily average dry weather flow not to exceed 200,000 gallons per day via Outfall 002; and stormwater on an intermittent and flow variable basis via Outfall 003. The proposed draft permit authorizes the discharge of treated process wastewater, storm water, domestic sewage, groundwater from remediation project, effluent from the BP Products North America Inc. Texas City Refinery's Land Treatment Farm, and effluent from the Borden Plant Site at a daily average flow not to exceed 23,000,000 gallons per day via Outfall 001; water treatment plant sludge settling pond effluent at a daily average dry weather flow not to exceed 200,000 gallons per day via Outfall 002; storm water runoff on an intermittent and flow variable basis via Outfall 003; cooling tower blowdown and storm water on an intermittent and flow variable basis via Outfall 004; treated process wastewater from the wastewater treatment plant on an intermittent and flow variable basis via Outfall 005; and cooling tower blowdown at a daily average flow not to exceed 2,160,000 gallons per day via Outfall 007. The facility is located 2401 Fifth Avenue South between 21st and 25th Streets in the City of Texas City, Galveston County, Texas.

D & K DEVELOPMENT CORP. has applied for a renewal of TPDES Permit No. WQ0013518001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 96,300 gallons per day. The facility is located at 2700 Highway 1187, on the southwest corner of the intersection of Farm-to-Market Road 1187 and Pershon Road, approximately 3 miles southwest of the intersection of Farm-to-Market Road 1187 and Farm-to-Market Road 731 in Tarrant County, Texas.

DOUGLAS UTILITY COMPANY has applied for a renewal of TPDES Permit No. 11200-001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 380,000 gallons per day. The facility is located south of North Belt, approximately one mile west of U.S. Highway 59, approximately 0.45 mile west of Lee Road in Harris County, Texas.

FRITO-LAY, INC. which operates a snack food production facility, including potato chips, corn chips, and tortilla chips., has applied for a major amendment to TPDES Permit No. WQ0002443000 to authorize an increase in production and resulting Biochemical Oxygen Demand (5-day), (BOD5) and Total Suspended Solid, (TSS) mass-based effluent limitations, an increase in the BOD5 and TSS single grab limits, a reduction in the maximum permitted dry weather flow rate, the authorization of an additional Outfall, the addition of a new waste stream, and the removal of a waste stream. The current permit authorizes the discharge of process wastewater, truck wash water, air scrubber wastewater, and storm water runoff at a daily average dry weather flow not to exceed 1,100,000 gallons per day via Outfall 001; and domestic wastewater at a daily average not to exceed 14,000 gallons per day via Outfall 002. The facility is located on the north side of State Highway 36 and approximately three miles west of the intersection of State Highway 36 and U.S. Alternate Highway 90 near the City of Rosenberg, Fort Bend County, Texas.

GEORGIA-PACIFIC WOOD PRODUCTS LLC which operates the Cleveland Plywood Mill, which manufactures plywood, dimensional lumber, sawdust, and pine bark, has applied for a major amendment to TPDES Permit No. WQ0002196000 to authorize the discharge of treated cooling tower blowdown via Outfall 001and to authorize the disposal from the log vat ponds at a daily average flow not to exceed 20,000 gallons per day via irrigation of 227 acres of pine plantation with native vegetation as underbrush (mostly grasses). The current permit authorizes the discharge of storm water, utility wastewater, drum debarker bearing water (once through cooling water), vehicle/equipment wash water, and wet decking water on an intermittent and flow variable basis via Outfall 001. The facility and irrigation area are located at 12936 Farm-to-Market Road 787, approximately one mile northwest of Farm-to-Market Road 787, and approximately 10 miles east of the City of Cleveland, Liberty County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 1 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0011630002, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 330,000 gallons per day. The facility will be located 3,700 feet northeast of the intersection of Kuykendahl and Kuykendahl-Huffsmith Road, and 9,300 feet west of Gosling Road in Harris County, Texas.

CITY OF HOUSTON has applied for a renewal of TPDES Permit No. WQ0010495148, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 488,000 gallons per day. The facility is located at 10545 Tidwell Road on the west bank of Greens Bayou, north of and adjacent to Tidwell Road in Harris County, Texas.

JM TEXAS LAND FUND NO. 4, L.P. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014797001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility will be located approximately 0.45 mile east and 1.2 miles south of the intersection of Becker Road and House Road, approximately six miles west of the City of Cypress in Harris County, Texas.

CITY OF KRUM has applied for a renewal of TPDES Permit No. WQ0010729001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 137,000 gallons per day. The facility is located on the east side of North Hickory Creek, approximately 0.6 miles southwest of the intersection of Farm-to-Market Road 156 and Farm-to-Market Road 1173 in Denton County, Texas.

LAJITAS UTILITY CO., INC. has applied for a renewal of TPDES Permit No. 14282-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 90,000 gallons per day. The facility is located approximately 2,000 feet south of Ranch-to-Market Road 170 and 1,800 feet east of the Rio Grande in Brewster County, Texas.

MONTGOMERY COUNTY MUNICIPAL UTILITY DISTRICT NO. 16 has applied for a renewal of TPDES Permit No. 11386-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 177,000 gallons per day. The facility is located south of the intersection of Hickory Lane and Tupelo Lane approximately 2 miles north of New Caney in Montgomery County, Texas.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. WQ0014216001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 20,000,000 gallons per day. The facility is located 1,100 feet northeast of the crossing of Muddy Creek by Pleasant Valley Road in Dallas County, Texas.

NORTHWEST FREEWAY MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. 11913-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 450,000 gallons per day. The facility is located approximately three-fourth (3/4) of a mile north-northwest of the intersection of Becker Road and U.S. Highway 290 in Harris County, Texas.

PLAINVIEW BIOENERGY, LLC proposes to operate a fuel ethanol production facility, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004829000, to authorize the discharge of boiler and cooling tower blowdown, reverse osmosis reject wastewater and water softener regeneration wastewater at a daily average flow not to exceed 570,000 gallons per day via Outfall 001. The facility is located adjacent to and north of the intersection of Farm-to-Market Road 789 and U.S. Highway 70, approximately four miles southeast of the City of Plainview, Hale County, Texas.

RANKIN ROAD WEST MUNICIPAL UTILITY DISTRICT has applied for a renewal of the existing permit that authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located approximately 3,100 feet north of Spears Road and approximately 5,300 feet northeast of the intersection of Spears Road and Walters Road in Harris County, Texas.

SEQUOIA IMPROVEMENT DISTRICT has applied for a renewal of TPDES Permit No. 10785-001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located at 5310 McDermott Drive in Sequoia Estates Subdivsion on the north bank of Greens Bayou approximately 2,000 feet west of U.S. Highway 59 and 0.7 mile south of Farm-to-Market Road 525 in Harris County, Texas.

SPRING INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0014526001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located at 950 Wunsche Loop Road, approximately 1/2 mile east of the intersection of Interstate Highway 45 North and Farm-to-Market Road 2920 in Harris County, Texas.

TEXAS DEPARTMENT OF TRANSPORTATION has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014790002, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 11,000 gallons per day. Authorization to discharge was previously permitted by expired Permit No. WQ0012952001. The facility is located on the southbound right-of-way of Interstate Highway 35 West, at a point approximately 3.9 miles south of Burleson in Johnson County, Texas.

Concentrated Animal Feeding Operation

The following require the applicants to publish notice in a newspaper. Written comments and requests for a public meeting may be submitted to the Office of the Chief Clerk, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

ARTURO L. BRISENO has applied for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004555000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to operate a Dairy Cattle Replacement facility at a maximum capacity of 2000 head. The facility is located on the east side of County Road 406 approximately 1.4 miles north of its intersection with Farm to Market Road 219. This intersection is approximately 3.9 miles northeast from Lingleville, in Erath County, Texas.

FRANS BINNERT OSINGA AND MARGREET OSINGA have applied for a renewal of, and conversion to an individual permit, Texas Pollutant Discharge Elimination System (TPDES) Registration No. WQ0002959000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to operate an existing Dairy Cattle facility at a maximum capacity of 990 head, of which 800 head are milking. The facility is located 8 miles south of Stephenville on U.S. Highway 281 in Erath County, Texas.

TEX-S, L.L.C. AND ENRIQUE DENATE have applied for a renewal of, and conversion to an individual permit, Texas Pollutant Discharge Elimination System (TPDES) Registration No. WQ0003640000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to operate an existing dairy cattle facility at a maximum capacity of 999 head of which all are milking cows. The facility is located on the east side of U.S. Highway 281 approximately one mile north of the intersection of Farm-to-Market Road 219 and U.S. Highway 281 in Hamilton County, Texas.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200703957
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 29, 2007

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Federal Emergency Management Agency

FEMA Public Notice Regarding Disaster Assistance

The Federal Emergency Management Agency (FEMA) hereby gives notice to the public of its intent to reimburse eligible applicants for eligible costs to repair and/or replace facilities damaged by flooding occurring from June 16, 2007 to August 3, 2007. This notice applies to the Public Assistance (PA), Individual Assistance (IA), and Hazard Mitigation Grant (HMGP) programs implemented under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§5121 - 5206.

Under a major disaster declaration (FEMA-1709-DR-TX) signed by the President on June 29, 2007, Amendment No. 1, signed July 6, 2007, Amendment No. 2, signed July 10, 2007, Amendment No. 3, signed July 10, 2007, Amendment No. 4, signed July 13, 2007, Amendment No. 5, signed July 18, 2007, Amendment No. 6 signed, July 25, 2007, Amendment No. 7 signed, July 31, 2007, Amendment No. 8, signed August 3, 2007, Amendment No. 9, signed August, 7, 2007, and Amendment No. 10, signed August 21, 2007 the following counties have been designated as adversely affected by the disaster and eligible for both IA and PA: Archer, Atascosa, Bee, Brown, Burnet, Cherokee, Comanche, Cooke, Coryell, Denton, Eastland, Grayson, Hamilton, Henderson, Hood, Lampasas, Llano, Medina, Parker, Refugio, Runnels, Smith, Starr, Tarrant, Upshur, Victoria, Walker, Webb, Wichita, Williamson, Van Zandt and Zavala; and the following counties are eligible for PA only: Anderson, Baylor, Bosque, Callahan, Coleman, Collin, Delta, Edwards, Ellis, Erath, Fannin, Hill, Hunt, Kaufman, Jim Hogg, Jones, Lamar, Mason, McCulloch, Menard, Mills, Montague, Navarro, Real, San Saba, Shackelford, Stephens, Throckmorton, Uvalde, Wise and Wilbarger. Additionally, all counties in Texas have been designated as eligible for HMGP. Additional counties may be designated for assistance at a later date.

This public notice concerns activities that may affect historic properties, activities that are located in or affect wetland areas or the 100-year floodplain, and critical facilities within the 500-year floodplain. Such activities may adversely affect the historic property, floodplain or wetland, or may result in continuing vulnerability to flood damage.

Presidential Executive Orders 11988 and 11990 require that all federal actions in or affecting the floodplain or wetlands be reviewed for opportunities to relocate, and evaluated for social, economic, historical, environmental, legal and safety considerations. Where there is no opportunity to relocate, FEMA is required to undertake a detailed review to determine what measures can be taken to minimize future damages. The public is invited to participate in the process of identifying alternatives and analyzing their impacts.

FEMA has determined that for certain types of facilities there are normally no alternatives to restoration in the floodplain/wetland. These are facilities that meet all of the following criteria: 1) FEMA's estimate of the cost of repairs is less than 50% of the cost to replace the entire facility, and is less than $100,000; 2) the facility is not located in a floodway; 3) the facility has not sustained major structural damage in a previous presidentially-declared flooding disaster or emergency; and 4) the facility is not critical (e.g., the facility is not a hospital, generating plant, emergency operations center, or a facility that contains dangerous materials). FEMA intends to provide assistance for the restoration of these facilities to their pre-disaster condition, except that certain measures to mitigate the effects of future flooding or other hazards may be included in the work. For example, a bridge or culvert restoration may include a larger waterway opening to decrease the risk of future washouts.

For routine activities, this will be the only public notice provided. Other activities and those involving facilities that do not meet the four criteria are required to undergo more detailed review, including study of alternate locations. Subsequent public notices regarding such projects will be published if necessary, as more specific information becomes available.

In many cases, an applicant may have started facility restoration before federal involvement. Even if the facility must undergo detailed review and analysis of alternate locations, FEMA will fund eligible restoration at the original location if the facility is functionally dependent on its floodplain location (e.g., bridges and flood control facilities), or the project facilitates an open space use, or the facility is an integral part of a larger network that is impractical or uneconomical to relocate, such as a road. In such cases, FEMA must also examine the possible effects of not restoring the facility, minimize floodplain/wetland impacts, and determine both that an overriding public need for the facility clearly outweighs the Executive Order requirements to avoid the floodplain/wetland, and that the site is the only practicable alternative. State of Texas and local officials will confirm to FEMA that proposed actions comply with all applicable state and local floodplain management and wetland protection requirements.

FEMA intends to provide IA program funding for disaster-related emergency housing. These actions may adversely affect a floodplain/wetland, or may result in continuing vulnerability to floods. These actions may include repair, restoration or construction of housing or private bridges, purchase and placement of travel trailers or manufactured housing units, or repair of structures as minimum protective measures. This will be the only public notice concerning these actions.

FEMA also intends to provide HMGP funding to the State of Texas to mitigate future disaster damages. These projects may include construction of new facilities, modification of existing, undamaged facilities, relocation of facilities out of floodplains, demolition of structures, or other types of projects to mitigate future disaster damages. In the course of developing project proposals, subsequent public notices will be published if necessary, as more specific information becomes available.

The National Historic Preservation Act requires federal agencies to take into account the effects of their undertakings on historic properties. Those actions or activities affecting buildings, structures, districts or objects 45 years or older or that affect archeological sites or undisturbed ground will require further review to determine if the property is eligible for listing in the National Register of Historic Places (Register). If the property is determined to be eligible for the Register, and FEMA's undertaking will adversely affect it, FEMA will provide additional public notices. For historic properties not adversely affected by FEMA's undertaking, this will be the only public notice.

As noted, this may be the only public notice regarding the above-described actions under the PA, IA, and HMGP programs. Interested persons may obtain information about these actions or a specific project by writing to the Federal Emergency Management Agency, Joint Field Office, 300 N. Valley Mills Drive, Waco, Texas 76710 or by calling (254) 741-8201. Comments should be sent in writing to Kenneth Clark, Federal Coordinating Officer, at the above address within 15 days of the date of this notice.

TRD-200703976

Frank Alamia
Attorney, Office of Chief Counsel
Federal Emergency Management Agency
Filed: August 29, 2007

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on September 24, 2007, at 10:00 a.m. to receive public comment on the proposed Medicaid payment rates for procedure codes relating to physician-administered drugs and biologicals and Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) listed below. These changes are part of the second quarter review of the procedure codes under the Healthcare Common Procedure Coding System (HCPCS). The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rates for the physician-administered drugs and biologicals and DMEPOS procedure codes are included in the table that follows this notice. The proposed payment rates for the second quarter HCPCS will be retroactively effective to July 1, 2007. All claims received on or after July 1, 2007, will be reprocessed.

Methodology and justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8021(c), which addresses reimbursement for durable medical equipment (DME) and expendable medical supplies; 1 TAC §355.8085, which addresses the Reimbursement Rates for Physicians and Certain Other Practitioners; 1 TAC §355.8441(9) - (10), which addresses reimbursement to Texas Health Steps (THSteps) providers for immunizations and vaccines; and the specific fee guidelines published in Section 2.2.1.2 of the 2007 Texas Medicaid Provider Procedures Manual. Rule §355.8085 requires HHSC to review the fees for individual services at least every two years.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after September 10, 2007. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

**Required Notice: The five character codes included in this notice are obtained from the Current Procedural Terminology (CPT®), copyright 2006 by the American Medical Association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of this notice is with HHSC and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in this notice. Fee schedules, relative value units, conversion factors and/or related components are not assigned by the AMA, are not part of CPT, and the AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of this notice should refer to the most recent Current Procedural Terminology, which contains the complete and most current listing of CPT codes and descriptive terms. Applicable FARS/DFARS apply. CPT is a registered trademark of the American Medical Association.*

Procedure Codes and Proposed Payment Rates

Procedure Code	Current Medicaid Fee	Proposed Medicaid Fee
1-Q4083	$0.00	$102.11
1-Q4084	$0.00	$178.66
1-Q4085	$0.00	$111.48
1-Q4086	$0.00	$178.24
1-Q4087	$0.00	$33.48
1-Q4088	$0.00	$31.20
1-Q4089	$0.00	$5.33
1-Q4090	$0.00	$64.74
1-Q4091	$0.00	$32.61
1-Q4092	$0.00	$31.86
1-Q4093	$0.00	$0.13
1-Q4094	$0.00	$0.53
1-Q4095	$0.00	$220.81
J-K0553	$0.00	$179.35
J-K0554	$0.00	$49.54
J-K0555	$0.00	$20.24

Type of Service (TOS) code key:
1 - Medical Services and J - New Durable Medical Equipment

TRD-200703980
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 29, 2007

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Department of State Health Services

Notice of Amendment to the Texas Schedules for Controlled Substances Adding Lisdexamfetamine to Schedule II

This amendment was signed by David L. Lakey, M.D, Commissioner of Health, on August 6, 2007, and will become effective 21 days after the date of publication of this notice in the *Texas Register*.

The Deputy Administrator of the Drug Enforcement Administration (DEA) placed the substance lisdexamfetamine, including its salts, isomers, and salts of its isomers into Schedule II of the Controlled Substances Act effective June 4, 2007. This final rule was published in the *Federal Register*, Volume 72, Number 85, pages 24532 - 24534. The Deputy Administrator of the DEA based this action on the following:

(1) Lisdexamfetamine has a high potential for abuse;

(2) Lisdexamfetamine has a currently accepted medical use in treatment in the United States; and

(3) Abuse of lisdexamfetamine may lead to severe psychological or physical dependence.

Pursuant to §481.034(g), as amended by the 75th Legislature, of the Texas Controlled Substances Act, Health and Safety Code, Chapter 481, at least 31 days have expired since notice of the above referenced action was published in the *Federal Register*; and, David L. Lakey, M.D., in the capacity as Commissioner of the Texas Department of State Health Services hereby orders that the substance lisdexamfetamine including its salts, isomers, and salts of its isomers be added to Schedule II of the Texas Controlled Substances Act. Schedule II of said Act is hereby amended to read as follows:

SCHEDULE II

Schedule II consists of:

Schedule II substances, vegetable origin, or chemical synthesis

***

Opiates

***

Schedule II stimulants

Unless listed in another schedule and except as provided by the Texas Controlled Substances Act, Health and Safety Code, §481.033, a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) Methamphetamine, including its salts, optical isomers, and salts of optical isomers;

(3) Methylphenidate and its salts,

(4) Phenmetrazine and its salts; and

*(5) Lisdexamfetamine, including its salts, isomers, and salts of its isomers.

Schedule II depressants

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Schedule II hallucinogenic substances

***

Schedule II precursors

***

Changes to the schedules are designated by an asterisk (*)

TRD-200703944
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: August 28, 2007

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Texas Department of Insurance

Company Licensing

Application to change the name of ROYAL INDEMNITY COMPANY to ARROWOOD INDEMNITY COMPANY, a foreign fire and/or casualty company. The home office is in Wilmington, Delaware.

Application to change the name of CORPORATE HEALTH INSURANCE COMPANY to AETNA HEALTH INSURANCE COMPANY, a foreign life, accident and/or health company. The home office is in Blue Bell, Pennsylvania.

Application for incorporation to the State of Texas by GRAND PROPERTY & CASUALTY INSURANCE COMPANY, a domestic fire and/or casualty company. The home office is in Waco, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200703965
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 29, 2007

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Correction of Error

The Texas Department of Insurance published a notice titled **"Notice of Call for Issues Related to the Adoption of Premium Rates, Rules, Forms, and the Regulation of the Business of Personal Property Title Insurance"** in the July 27, 2007, issue of the *Texas Register* (32 TexReg 4659).

In the third paragraph, which begins "All proposals and submissions...." the reference number was incorrect. It should read as follows: "(please refer to reference number T-0807-09-I)".

TRD-200703977

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of MIC RISK MANAGEMENT SERVICES, L.L.C., a foreign third party administrator. The home office is SPRINGFIELD, ILLINOIS.

Application of HARMONY BEHAVIORAL HEALTH, INC., a foreign third party administrator. The home office is TAMPA, FLORIDA.

Application of COMPREHENSIVE HEALTH MANAGEMENT, INC. (using the assumed name FLORIDA COMPREHENSIVE HEALTH MANAGEMENT, INC.), a foreign third party administrator. The home office is TAMPA, FLORIDA.

Application to change the name of GOVERNMENT EMPLOYEES HOSPITAL ASSOCIATION, INC. to GOVERNMENT EMPLOYEES HEALTH ASSOCIATIONS, INC., a foreign third party administrator. The home office is INDEPENDENCE, MISSOURI.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200703971
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: August 29, 2007

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Texas Judicial Council

Request for Applications

FY08 Formula Grant Program

Task Force on Indigent Defense

Visit website at www.courts.state.tx.us/tfid for more information.

Contact: Whitney Stark, Grants Administrator

Phone: (512) 936-6996

TRD-200703948
James Bethke
Director
Texas Judicial Council
Filed: August 28, 2007

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Texas Lottery Commission

Instant Game Number 1007 "Big Riches"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1007 is "BIG RICHES". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1007 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1007.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 6, 7,

8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 10X, $5.00, $10.00, $15.00, $20.00, $25.00, $40.00, $50.00, $100, $500, $1,000, and $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1007 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
6	SIX
7	SVN
8	EGT
9	NIN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
10X	WINX10
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1007 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100 or $500.

I. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (1007), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1007-0000001-001.

L. Pack - A pack of "BIG RICHES" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of 001 and front 075.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "BIG RICHES" Instant Game No. 1007 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "BIG RICHES" Instant Game is determined once the latex on the ticket is scratched off to expose 44 (forty-four) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the BIG NUMBERS play symbols, the player wins the PRIZE shown for that number. If a player reveals a "10X" play symbol, the player wins 10 (ten) times the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 44 (forty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 44 (forty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 44 (forty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 44 (forty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The "10X" play symbol (10 times multiplier) will only appear once on intended winning tickets and only as dictated by the prize structure.

C. No more than three (3) identical non-winning prize symbols will appear on a ticket.

D. No duplicate BIG NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 5 and $5).

H. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "BIG RICHES" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "BIG RICHES" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "BIG RICHES" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "BIG RICHES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "BIG RICHES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1007. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1007 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	604,800	8.33
$10	504,000	10.00
$15	134,400	37.50
$20	100,800	50.00
$50	67,200	75.00
$100	8,274	609.14
$500	630	8,000.00
$1,000	126	40,000.00
$5,000	13	387,692.31
$50,000	7	720,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.55. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1007 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1007, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200703872
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 24, 2007

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Instant Game Number 1012 "Easy Cash"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1012 is "EASY CASH". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1012 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1012.

A. Display Printing--That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint--The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol--The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, MONEY BAG SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, and $1,000.

D. Play Symbol Caption--The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1012 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
MONEY BAG SYMBOL	AUTO
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$1,000	ONE THOU

E. Retailer Validation Code--Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1012 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
FOR	$4.00
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number--A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize--A prize of $1.00, $2.00, $4.00, $5.00, $10.00, or $20.00.

H. Mid-Tier Prize--A prize of $50.00 or $100.

I. High-Tier Prize--A prize of $1,000.

J. Bar Code--A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number, and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number--A 13 (thirteen) digit number consisting of the four (4) digit game number (1012), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1012-0000001-001.

L. Pack--A pack of "EASY CASH" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page, etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

M. Non-Winning Ticket--A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "EASY CASH" Instant Game No. 1012 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "EASY CASH" Instant Game is determined once the latex on the ticket is scratched off to expose 12 (twelve) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to either WINNING NUMBER play symbol, the player wins the prize shown for that number. If a player reveals a "moneybag" play symbol, the player wins the prize shown instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 12 (twelve) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified; and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code, and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut and have exactly 12 (twelve) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 12 (twelve) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 12 (twelve) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols.

C. No duplicate non-winning play symbols.

D. A non-winning prize symbol will never be the same as the winning prize symbol(s).

E. No prize amount in a non-winning spot will correspond with the YOUR NUMBER play symbol (i.e., 5 and $5).

F. The top prize will appear on every ticket unless otherwise restricted per the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim an "EASY CASH" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket, provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim an "EASY CASH" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming an "EASY CASH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller of Public Accounts, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Office of the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "EASY CASH" Instant Game, the Texas Lottery shall deliver to an adult mem-

ber of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "EASY CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period and in the manner specified in these Game Procedures and on the back of each ticket shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 1012. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1012 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	1,209,600	8.33
$2	470,400	21.43
$4	201,600	50.00
$5	50,400	200.00
$10	67,200	150.00
$20	67,200	150.00
$50	8,988	1,121.50
$100	798	12,631.58
$1,000	294	34,285.71

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.85. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1012 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1012, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200703934

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 28, 2007

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 21, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Friendship Cable of Texas, Inc. d/b/a Suddenlink Communications for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 34654 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 34654.

TRD-200703830
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 23, 2007

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on August 22, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to a State- Issued Certificate of Franchise Authority, Project Number 34660 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 34660.

TRD-200703953
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 28, 2007

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 24, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 34669 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 34669.

TRD-200703978
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2007

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 27, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Charter Communications VI, L.L.C. d/b/a Charter Communications for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 34673 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 34673.

TRD-200703979
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 29, 2007

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Notice of Application for Authority to Recover Lost Revenues and Costs of Implementing Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas, an application of August 21, 2007, for authority to recover lost revenues and costs of implementing expanded local calling service (ELCS) pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §§55.041-55.048 and P.U.C. Substantive Rule §26.221. A summary of the application follows.

Project Title and Number: Application of Windstream Sugar Land, Inc. for Authority to Recover Lost Revenues and Costs of Implementing Expanded Local Calling Service. Project Number 34585.

Windstream Sugar Land, Inc. requests commission approval to continue a monthly surcharge in the revised amount of $.66 for business lines and $.33 for residential lines to each Windstream Sugar Land, Inc. basic local exchange access line, effective October 27, 2007. Windstream Sugar Land, Inc. seeks approval to continue recovering costs and lost revenues associated with all ELCS routes currently in service in Windstream Sugar Land's service territory.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477 no later than September 28, 2007. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Project Number 34585.

TRD-200703822

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 22, 2007

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Notice of Application for Certificate of Convenience and Necessity for a Proposed Transmission Line in Chambers, Hardin, Jasper, Jefferson, Liberty, Newton and Orange Counties, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on August 22, 2007, for a certificate of convenience and necessity for a proposed transmission line in Chambers, Hardin, Jasper, Jefferson, Liberty, Newton and Orange Counties, Texas

Docket Style and Number: Application of Kelson Transmission Company, LLC for a Certificate of Convenience and Necessity for the Proposed Cedar Bayou-to Deweyville 345 kV Transmission Line within Chambers, Hardin, Jasper, Jefferson, Liberty, Newton, and Orange Counties, Docket Number 34611.

The Application: The application of Kelson Transmission Company, LLC (Kelson Transmission) for a proposed transmission line is designated as the Cedar Bayou to Deweyville Transmission Line Project. Kelson Transmission stated that the proposed transmission line is needed to address the need for more electric generation resources within ERCOT. The miles of right-of-way for this project will be approximately 105 miles of double circuit 345-kV electric transmission line between the existing Cedar Bayou substation in western Chambers County, Texas and the proposed Deweyville substation to be located in southeastern Newton County, Texas. The estimated date to energize facilities is May 2010.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is October 8, 2007. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 34611.

TRD-200703902
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 24, 2007

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on August 22, 2007, for waiver of denial by the Pooling Administrator (PA) of AT&T Texas' request for one thousand-block in the Eagle Pass rate center.

Docket Title and Number: Petition of AT&T Texas for Waiver of Denial of Numbering Resources in the Eagle Pass rate center.

The Application: AT&T Texas submitted applications to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than September 12, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 34663.

TRD-200703901
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 24, 2007

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The Texas A&M University System

Communication Specialist - Request for Qualifications

RFQ 710-OGC-02

The Texas A&M University System is accepting proposals and intends to enter into an Agreement with a Communication Specialist to perform the duties of communications consultant including but not limited to providing advice and consultation on speech delivery to the Chancellor and other A&M System employees, providing advice and consultation to proactively promote critical research and academic projects to the public, and providing general communications advice and consultation as necessary. The awarded vendor shall complete all authorized work in accordance with the time for performance described for the work and consistent with the highest customs, standards and practices of his/her business or profession.

The RFQ documentation may be obtained by contacting: Don Barwick, HUB & Procurement Manager, System Office of HUB & Procurement Programs, The Texas A&M University System, 200 Technology Way, Suite 1267, College Station, Texas 77845 or e-mail at dbarwick@tamu.edu.

The A&M System is an institution of higher education and has determined that there is a substantial need for communications consulting services. The A&M System cannot adequately obtain these communications consulting services with its own personnel or obtain the consulting services through a contract with a governmental entity. The A&M System finds it of utmost importance to provide a positive, consistent message that takes into account an outside perspective. As an agency of the State of Texas, it is vital for the A&M System to represent itself in the most reputable manner possible. To be able to do this, the A&M System and its key representatives must address the public in a variety of settings and must be able to consider the issues that those outside of the A&M System find important. A communications consultant with expertise in dealing with state and federal governmental agencies and the private sector, and who is able to take a more detached global view of issues will provide such a needed service.

The A&M System will base its choice on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and if other considerations are equal give preference to a consultant whose principal place of business is in the state or who will manage the consulting contract wholly from an office in the state.

Proposals must be received on or before 2:00 p.m. CDT on September 26, 2007.

TRD-200703949

Don Barwick
HUB & Procurement Manager
The Texas A&M University System
Filed: August 28, 2007

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Bridgeport, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

The following is a listing of proposed projects at Bridgeport Municipal Airport during the course of the next five years through multiple grants.

Current Project: TxDOT CSJ No. 0802BRGPT. Scope: Provide engineering/design services to install PAPI-2 runway 17 end, upgrade runway exit signs, rehabilitate entrance road, construct drainage improvements runway 35 end, install hold signs at hold lines (taxiways B, E, F, & B-south end), rehabilitate and mark parallel and cross taxiways (B, B-1, B-2, C, D, E, & F), rehabilitate and mark runway 17-35, and rehabilitate apron.

The HUB goal is race neutral. TxDOT Project Manager is Alan Schmidt, P.E.

Future scope work items for engineering/design services within the next five years may include but are not necessarily limited to the following:

1. Extend runway 17-35
2. Extend medium intensity runway lights
3. Install two threshold lights at runway 17-35
4. Expand and rehabilitate apron
5. Rehabilitate north and south hangar access taxiways
6. Rehabilitate and mark parallel taxiway
7. Rehabilitate stub taxiway
8. Rehabilitate terminal apron
9. Rehabilitate and mark runway 17-35
10. Install taxiway CL reflectors
11. Construct auto parking (10 spaces)

The City of Bridgeport reserves the right to determine which of the above scope of services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent airport layout plan are available online at **www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm** by selecting Bridgeport Municipal Airport. The proposal should address a technical approach for the current scope. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be e-mailed by request or downloaded from the TxDOT web site at **www.dot.state.tx.us/services/aviation/consultant.htm**. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than October 1, 2007, 4:00 p.m. Electronic facsimiles or forms sent by e-mail will not be accepted. Please mark the envelope of the forms to the attention of Amy Slaughter.

The Consultant Selection Committee (committee) will be composed of Aviation Division staff members and a local government member. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at **http://www.dot.state.tx.us/services/aviation/consultant.htm**. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Amy Slaughter, Grant Manager at 1-800-68-PILOT at extension 4519. For technical questions, please contact Alan Schmidt, at 1-800-68-PILOT at extension 4527.

TRD-200703932
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: August 28, 2007

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Notice of Request for Proposal

The Texas Department of Transportation (department) announces a Request for Proposal (RFP) for intercity bus mobility projects funded through the Federal Transit Administration (FTA) §5311(f) intercity bus program. It is anticipated that multiple projects will be selected for State Fiscal Year 2009. Project selection will be administered by the Public Transportation Division (PTN). Selected projects will be awarded in the form of grants, with payments made for allowable reimbursable expenses or for defined deliverables. The proposer will become a subrecipient of the department.

Purpose: The RFP invites proposals for services to develop, promote, or support intercity bus mobility. The objectives for these proposals are to support the connection between nonurbanized areas and the larger regional or national system of intercity bus service, to support services to meet the intercity travel needs of residents in nonurbanized areas,

or to support the infrastructure of the intercity bus network through planning, marketing assistance, and vehicle capital investment. In the process of meeting these objectives, projects are also to support and promote the coordination of public transportation services across geographies, jurisdictions, and program areas. Coordination between nonurbanized and urbanized areas and between client transportation services and other types of public transportation are particular objectives.

Eligible Projects: Eligible types of projects have been defined by the department in accordance with FTA guidelines, other laws and regulations, and in consultation with members of the public transportation and the intercity bus industries. These include projects for vehicle capital, planning, marketing, facilities, and operating assistance.

Eligible Applicants: Proposers shall be required to enter into a grant agreement as a subrecipient of the department. Eligible subrecipients include state agencies, local public bodies and agencies thereof, private-nonprofit organizations, operators of public transportation services, and private for-profit operators.

Availability of Funds: In accordance with the Transportation Code, Chapter 455, the department currently provides funding for intercity bus mobility projects funded through FTA §5311(f) intercity bus program. Upon full reauthorization of the federal transit appropriations bill, the total amount available is expected to be about $3.9 million, which the department expects to award for intercity bus opportunities during the Fiscal Year.

Review and Award Criteria: Proposals will be evaluated against a matrix of criteria and then prioritized. Subject to available funding, the department is placing no preconditions on the number or on the types of projects to be selected for funding. The department reserves the right to conduct negotiations pertaining to a proposer's initial responses including, but not limited to, specifications and prices. An approximate balance in funding awarded to the types of projects, or an approximate geographic balance to selected projects, may be seen as appropriate, depending on the proposals that are received. The department may consider these additional criteria when recommending prioritized projects to the Texas Transportation Commission.

Key Dates and Deadlines:

November 2, 2007: Written questions for the proposal are due at PTN.

November 9, 2007: Written responses to questions posted on PTN website and mailed to all firms who submitted questions.

January 28, 2008: Deadline for receipt of proposals.

April 18, 2008: Target date for the department to complete the evaluation, prioritization, and negotiation of proposals.

June 26, 2008: Presentation of project selection recommendations to the Texas Transportation Commission for their action.

August 1, 2008: Target date for all project grant agreements to be executed, with approved scopes of work and calendars of work.

September 1, 2008: Target date for all project grant agreements to become effective.

To Obtain a Copy of the RFP: The RFP will be posted on the Public Transportation Division website at **http://www.txdot.gov/services/public_transportation/intercity.htm**. Proposers with questions relating to the RFP should contact Pat Bittner at **pbittne@dot.state.tx.us**, or by phone at (512) 416-2863.

TRD-200703975
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: August 29, 2007

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Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

www.txdot.gov/about_us/public_hearings_and_meetings/aviation.htm

Or visit **www.txdot.gov**, click on Citizen, click on Public Hearings, and then click on Aviation.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-200703933
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: August 28, 2007

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